THE GENERAL STATUTES OF NORTH CAROLINA

1967 CUMULATIVE SUPPLEMENT

Completely Annotated, under the Supervision of the Department of Justice, by the Editorial Staff of the Publishers

UNDER THE DIRECTION OF
W. O. LEWIS, D. W. PARRISH, JR., S. G. ALRICH, W. M. WILLSON
AND BEIRNE STEDMAN

Volume 1A

Place in Pocket of Corresponding 1953 Recompiled Volume of Main Set and Discard Previous Supplement

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Preface

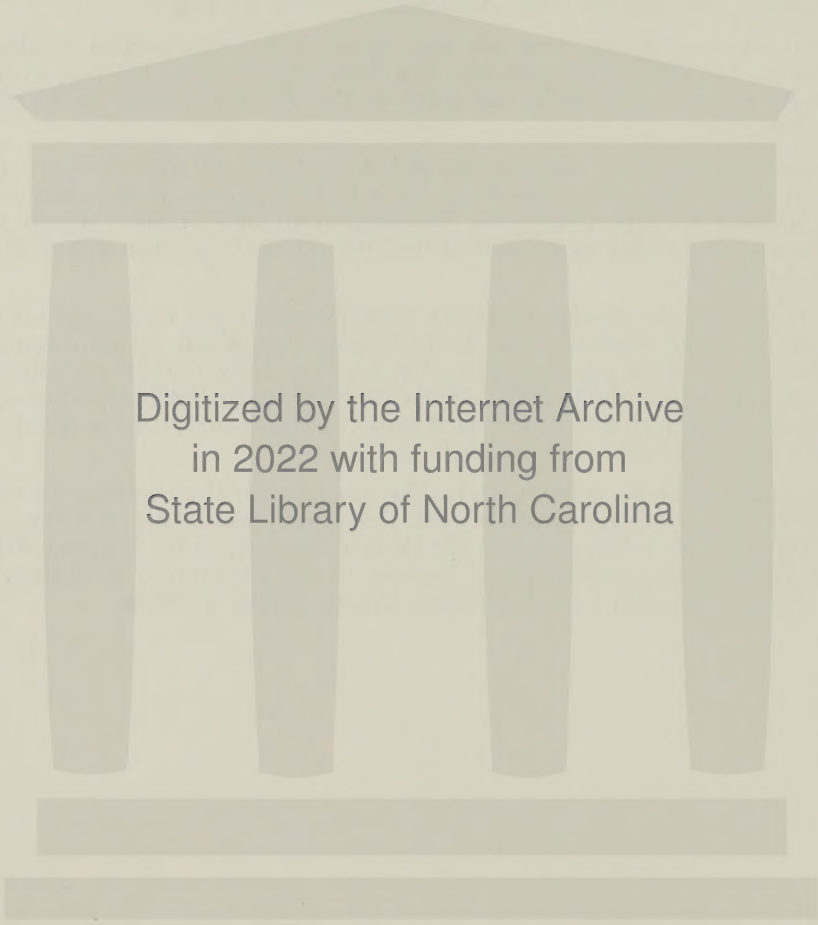
This Cumulative Supplement to Recompiled Volume 1A contains the general laws of a permanent nature enacted at the 1953, 1955, 1956, 1957, 1959, 1961, 1963, 1965, 1966 and 1967 Sessions of the General Assembly, which are within the scope of such volume, and brings to date the annotations included therein. Chapter 954, Session Laws 1967, effective July 1, 1969, which enacts new Chapter 1A, "Rules of Civil Procedure," and amends and repeals certain sections of Chapter 1 of the General Statutes, is not included in this Supplement. It is published in Pamphlet No. 6 of the 1967 Advance Legislative Service.

Amendments of former laws are inserted under the same section numbers appearing in the General Statutes and new laws appear under the proper chapter headings. Editors' notes point out many of the changes effected by the amendatory acts.

Chapter analyses show new sections and also old sections with changed captions. An index to all statutes codified herein prior to 1961 appears in Replacement Volumes 4B and 4C. The Cumulative Supplements to such volumes contain an index to statutes codified as a result of the 1961, 1963, 1965, 1966 and 1967 legislative sessions.

A majority of the Session Laws are made effective upon ratification but a few provide for stated effective dates. If the Session Law makes no provision for an effective date, the law becomes effective under G.S. 120-20 "from and after thirty days after the adjournment of the session" in which passed. All legislation appearing herein became effective upon ratification, unless noted to the contrary in an editor's note or an effective date note.

The members of the North Carolina Bar are requested to communicate any defects they may find in the General Statutes or in this Supplement, and any suggestions they may have for improving the General Statutes, to the Division of Legislative Drafting and Codification of Statutes of the Department of Justice, or to The Michie Company, Law Publishers, Charlottesville, Virginia.



Scope of Volume

Statutes:

Permanent portions of the general laws enacted at the 1953, 1955, 1956, 1957, 1959, 1961, 1963, 1965 and 1967 Sessions of the General Assembly affecting Chapters 1 and 1B of the General Statutes.

Annotations:

Sources of the annotations:

North Carolina Reports volumes 233 (p. 313)-271 (p. 226).
Federal Reporter 2nd Series volumes 186 (p. 745)-378 (p. 376).
Federal Supplement volumes 95 (p. 249)-269 (p. 96).
United States Reports volumes 340 (p. 367)-387 (p. 427).
Supreme Court Reporter volumes 71 (p. 474)-87 (p. 1608).
North Carolina Law Review volumes 29 (p. 227)-45 (p. 809).

The General Statutes of North Carolina
1967 Cumulative Supplement

VOLUME 1A

Chapter 1.

Civil Procedure.

SUBCHAPTER VII. PRE-TRIAL HEARINGS; TRIAL AND ITS INCIDENTS.

Article 19.

Trial.

Sec.
1-180.1. Judge not to comment on verdict.
1-181.1. View by jury.
1-183.1. Effect on counterclaim of nonsuit as to plaintiff's claim.

Article 22.

Verdict and Exceptions.

1-206. Objections and exceptions.

SUBCHAPTER VIII. JUDGMENT.

Article 23.

Judgment.

1-209.1. Petitioner who abandons condemnation proceeding taxed with fee for respondent's attorney.
1-209.2. Voluntary nonsuit by petitioner in condemnation proceeding
1-217.2. Judgments by default to remove cloud from title to real estate validated.
1-239. Paid to clerk; docket credited; transcript to other counties; notice to attorney for judgment creditor.
1-240. [Repealed.]

SUBCHAPTER IX. APPEAL.

Article 27.

Appeal.

1-287.1. Dismissal of appeals to Supreme Court when statement of case not served within time allowed.

SUBCHAPTER X. EXECUTION.

Article 28.

Execution.

1-315. Property liable to sale under execution; bill of sale.
1-324.1. Judgment against corporation; property subject to execution.
1-324.2. Agent must furnish information as to corporate officers and property.
1-324.3. Shares subject to execution; agent must furnish information.
1-324.4. Debts due corporation subject to execution; duty, etc of agent.
1-324.5. Violations of three preceding sections misdemeanor.
1-324.6. Proceedings when custodian of corporate books is a nonresident.
1-324.7. Duty and liability of nonresident custodian.

Article 29A.

Judicial Sales.

Part 1. General Provisions.

Sec.
1-339.3a. Judge or clerk may order public or private sale.

Article 29B.

Execution Sales.

Part 2. Procedure for Sale.

1-339.68. Deed for real property sold; property subject to liens; orders for possession.

Article 29C.

Validating Sections.

1-339.77. Validation of certain sales confirmed prior to time prescribed by law.

SUBCHAPTER XII. SPECIAL PROCEEDINGS.

Article 33.

Special Proceedings.

1-401. Clerk acts summarily; signing by petitioners; authorization to attorney.
1-407. Commissioner holding proceeds of land sold for reinvestment to give bond.
1-407.1. Bond required to protect interest of infant or incompetent.
1-407.2. When court may waive bond; premium paid from fund protected.
1-408.1. Clerk may order surveys in civil actions and special proceedings involving sale of land.

SUBCHAPTER XIII. PROVISIONAL REMEDIES.

Article 38.

Receivers.

Part 1. Receivers Generally.

1-506. [Repealed.]

Part 2. Receivers of Corporations.

1-507.1. Appointment and removal.
1-507.2. Powers and bond.
1-507.3. Title and inventory.
1-507.4. Foreclosure by receivers and trustees of corporate mortgagees or grantees.
1-507.5. May send for persons and papers; penalty for refusing to answer.
1-507.6. Proof of claims; time limit.
1-507.7. Report on claims to court; exceptions and jury trial.
1-507.8. Property sold pending litigation.

SUBCHAPTER I. DEFINITIONS AND GENERAL PROVISIONS.

ARTICLE 1.

Definitions.

§ 1-2. Actions.

An inquisition of lunacy is not a civil action as defined in this section. In re Dunn, 239 N. C. 378, 79 S. E. (2d) 921 (1954).

Quoted in Gillikin v. Gillikin, 248 N. C. 710, 104 S. E. (2d) 861 (1958).

§ 1-3. Special proceedings.

An inquisition of lunacy is not a special proceeding under this section. In re Dunn, 239 N. C. 378, 79 S. E. (2d) 921 (1954).

Cited in Gillikin v. Gillikin, 248 N. C. 710, 104 S. E. (2d) 861 (1958).

§ 1-5. Criminal action.

An inquisition of lunacy is not a criminal action within the meaning of this section. In re Dunn, 239 N. C. 378, 79 S. E. (2d) 921 (1954).

Cited in State v. Rumfelt, 241 N. C. 375, 85 S. E. (2d) 398 (1955).

§ 1-6. Civil action.

Cited in Gillikin v. Gillikin, 248 N. C. 710, 104 S. E. (2d) 861 (1958).

ARTICLE 2.

General Provisions.

§ 1-11. How party may appear.

Cannot Appear in Person, etc.—

A party has the right to appear in propria persona or by counsel, but this right is alternative. State v. Phillip, 261 N.C. 263, 134 S.E.2d 386 (1964).

SUBCHAPTER II. LIMITATIONS.

ARTICLE 3.

Limitations, General Provisions.

§ 1-14. When action commenced.

Editor's Note.—For case law survey as to statute of limitations, see 44 N.C.L. Rev. 906 (1966).

Conflict of Laws.—In an action in a United States district court in North Carolina for wrongful death under the Louisiana wrongful death statute, the procedural law of North Carolina and not the Federal Rules of Civil Procedure determined when the action was commenced. Rios v. Drennan, 209 F Supp. 927 (1962).

Requirements of Due Process. — Due process of law requires that a defendant shall be properly notified of the proceeding against him, and have an opportunity to be present and to be heard. B-W Acceptance Corp. v. Spencer, 268 N.C. 1, 149 S.E.2d 570 (1966).

Issuance Does Not Confer Jurisdiction.—

If there has been no service of summons and no waiver by appearance, the court has no jurisdiction, and any judgment rendered would be void. B-W Acceptance Corp. v. Spencer, 268 N.C. 1, 149 S.E.2d 570 (1966).

But Personal Service, Acceptance of Service, or Voluntary Appearance Gives Jurisdiction.—When the defendant has been duly served with summons personally within the State, or has accepted service or has voluntarily appeared in court, jurisdiction over the person exists, and the court may proceed to render a personal judgment against the defendant. B-W Acceptance Corp. v. Spencer, 268 N.C. 1, 149 S.E.2d 570 (1966).

Service Not Waived by Appearance under Order for Pretrial Examination.—The appearance of a party under order of court for the purpose of a pretrial examination does not amount to a waiver of service of summons, since the appearance is not voluntary. B-W Acceptance Corp. v. Spencer, 268 N.C. 1, 149 S.E.2d 570 (1966).

Sufficiency of Service.—Where an order for service of process on a nonresident motorist was directed to the sheriff of one county and process was served by the sheriff of another county, service was insufficient. Byrd v. Pawlick, 362 F.2d 390 (4th Cir. 1966).

Applied in In re Roberts Co., 258 N. C. 184, 128 S. E. (2d) 137 (1962); City of Reidsville v. Burton, 269 N.C. 206, 152 S.E.2d 147 (1967).

§ 1-15. Statute runs from accrual of action; pleading.

When the statute starts to run, it continues until stopped by appropriate judicial process. Speas v. Ford, 253 N. C. 770, 117 S. E. (2d) 784 (1961); B-W Acceptance Corp. v. Spencer, 268 N.C. 1, 149 S.E.2d 570 (1966).

In general a cause of action accrues as soon as the right to institute and maintain a suit arises. Thurston Motor Lines, Inc. v. General Motors Corp., 258 N. C. 323, 128 S. E. (2d) 413 (1962).

A cause of action generally accrues and

the statute of limitations begins to run whenever a party becomes liable to an action, if at such time the demanding party is under no disability. In no event can a statute of limitations begin to run until plaintiff is entitled to institute action. City of Reidsville v. Burton, 269 N.C. 206, 152 S.E.2d 147 (1967).

Cause of Action for Negligent Injury Ordinarily Accrues When Wrong Committed.—Unless tolled by disability or the fraudulent concealment of the cause of action, a cause of action for negligent injury ordinarily accrues when the wrong is committed giving rise to the right to suit, even though the damages at that time be nominal and without regard to the time when consequential injuries are discovered or should have been discovered. Shearin v. Lloyd, 246 N. C. 363, 98 S. E. (2d) 508 (1957).

Necessity of Pleading Statute.—

Unless a statute of limitations is annexed to the cause of action itself, the bar of limitation must be affirmatively pleaded in order to be available as a defense. Overton v. Overton, 259 N. C. 31, 129 S. E. (2d) 593 (1963).

A statute of limitations is not available as a defense or bar to an action unless pleaded, nor can it be raised, ordinarily, by motion to dismiss. Iredell County v. Crawford, 262 N.C. 720, 138 S.E.2d 539 (1964).

Manner of Pleading.—

Statutes of limitation cannot be taken advantage of by demurrer but only by answer. Lewis v. Shaver, 236 N C. 510, 73 S. E. (2d) 320 (1952); Reid v. Holden, 242 N. C. 408, 88 S. E. (2d) 125 (1955); Elliott v. Goss, 250 N. C. 185, 108 S. E. (2d) 475 (1959); Iredell County v. Crawford, 262 N.C. 720, 138 S.E.2d 539 (1964).

The contention that an amendment constituting a new cause of action was filed after the bar of the statute of limitations was complete cannot be raised by demurrer or motion to strike, but under this section can be presented only by answer. Stamey v. Rutherfordton Electric Membership Corp., 249 N. C. 90, 105 S. E. (2d) 282 (1958).

Where petitioner alleged that the petitioner "in apt time and in proper manner, filed her dissent from said will," and the answer "denied" this allegation, the petitioner's allegation was a mere conclusion and respondent's general denial was not affirmative pleading. Overton v. Overton, 259 N. C. 31, 129 S. E. (2d) 593 (1963).

Accrual of Cause Illustrated.—

Where plaintiff alleged that a truck-tractor was equipped with a faulty and dangerous carburetor, likely to cause said truck-tractor to be "ignited with fire," when sold and delivered to plaintiff, and that defendants knew or by the exercise of due care should have known of such defective condition, and failed to warn plaintiff thereof, plaintiff suffered injury and his rights were invaded immediately upon the sale and delivery of the truck-tractor to plaintiff, and a cause of action in favor of plaintiff and against defendants then accrued for which plaintiff was entitled to recover nominal damages at least. Thurston Motor Lines, Inc. v. General Motors Corp., 258 N. C. 323, 128 S. E. (2d) 413 (1962).

In an action instituted to recover damages resulting from dust and dirt injected into plaintiffs' house by a gas furnace and air conditioner purchased from defendant, plaintiffs' allegations were to the effect that the defect was obvious from the beginning, that complaints were made to defendant, and that defendant's employees reported no defect could be found in the system but that they would continue to look. It was held that plaintiffs' cause of action accrued upon the occurrence of the first damage, and plaintiffs were not entitled to rely upon estoppel of defendant to plead the statute, since defendant consistently took the position that no defect existed and never made any representation that would have led plaintiffs to refrain from suing. Matthieu v. Piedmont Natural Gas Co., 269 N.C. 212, 152 S.E.2d 336 (1967).

When Statute Begins to Run against Remainderman.—Ordinarily the statute of limitations does not begin to run against the rights of a remainderman to maintain an action to recover possession of land until after the expiration of the life estate. However, a remainderman is not required to wait until after the expiration of the life estate to bring an action to quiet title or otherwise protect his interest. Walston v. Applewhite & Co., 237 N. C. 419, 75 S. E. (2d) 138 (1953).

Continuing or Recurring Damages.—When the basis of the cause of action produces continuing or recurring damages, the cause of action accrues at the time damages are first sustained, the subsequent damages being merely in aggravation of the original damages and not being essential to the cause of action. Matthieu v. Piedmont Natural Gas Co., 269 N.C. 212, 152 S.E.2d 336 (1967).

"Special Cases" Where Different Limitation Prescribed.—The only "special case" in respect to torts "where a different limitation is prescribed by statute" is contained in the three-year statute. G. S. 1-52 This "different limitation" relates only to ac-

tions grounded on allegations of fraud or mistake. Lewis v. Shaver, 236 N. C. 510, 73 S. E. (2d) 320 (1952).

A cause of action accrues and the statute of limitations begins to run whenever a party becomes liable to an action, if at such time the demanding party is under no disability. This rule is subject to certain exceptions, such as torts grounded on fraud or mistake. Matthieu v. Piedmont Natural Gas Co., 269 N.C. 212, 152 S.E.2d 336 (1967).

In an action to recover payments made under a contract to sell realty, no question of the statute of limitations arises where the provisions of § 1-52 were not pleaded. Brannock v. Fletcher, 271 N.C. 65, 155 S.E.2d 532 (1967).

Mere Lack of Knowledge Does Not Postpone Running of Statute.—Mere lack of knowledge of the facts constituting a cause of action in tort, in the absence of fraudulent concealment of facts by the tortfeasor, does not postpone the running of the statute. Lewis v. Shaver, 236 N. C. 510, 73 S. E. (2d) 320 (1952).

A cause of action for malpractice based on the surgeon's negligence in leaving a foreign object in the body at the conclusion of an operation, accrues immediately upon the closing of the incision, and such action may not be maintained more than three years thereafter even though the consequential damage from such negligence is not discovered until sometime after the operation. Shearin v. Lloyd, 246 N. C. 363, 98 S. E. (2d) 508 (1957).

Where there is no evidence that a surgeon attempted to conceal from his patient the fact that a foreign substance had been left in the patient's body at the conclusion of the operation, but to the contrary that the surgeon frankly disclosed the facts upon their ascertainment by X-ray less than two years after the operation, nonsuit is properly entered in an action for malpractice instituted more than three years after the operation, here being no evidence of fraudulent concealment. Shearin v. Lloyd, 246 N. C. 363, 98 S. E. (2d) 508 (1957).

Evidence held to negate fraudulent concealment of cause of action against surgeon for technical assault in performing an operation beyond the scope of the one authorized. Lewis v. Shaver, 236 N. C. 510, 73 S. E. (2d) 320 (1952).

Applied in Merchants & Planters Nat. Bank v. Appleyard, 238 N. C. 145, 77 S. E. (2d) 783 (1953), (con. op.).

Cited in J. G. Dudley Co. v. Commissioner of Internal Revenue, 298 F. (2d) 750 (1962).

§ 1-16. Defenses deemed pleaded by insane party.

Applied in Elledge v. Welch, 238 N. C. 61, 76 S. E. (2d) 340 (1953).

§ 1-17. Disabilities.

Application to Limitation on Widow's Right to Dissent from Husband's Will.—See note to § 30-1.

Disability Subsequent to Commencement of Running of Statute.—Where the statute of limitations begins to run in favor of one in adverse possession against an owner who dies leaving heirs who are minors, their disability of infancy does not affect the operation of the statute, since the disability is subsequent to the commencement of the running of the statute. Battle v. Battle, 235 N. C. 499, 70 S. E. (2d) 492 (1952).

Effect of Guardian Having Right to Sue.—

The statute of limitations begins to run against an infant or an insane person who is represented by a guardian at the time the cause of action accrues. First-Citizens Bank & Trust Co. v. Willis, 257 N. C. 59, 125 S. E. (2d) 359 (1962)

It is the rule in this State that, except in suits for realty where the legal title is in the ward, the statute of limitations begins to run against an infant who is represented by a general guardian as to any action which the guardian could or should bring at the time the cause of action accrues. Teele v. Kerr, 261 N.C. 148, 134 S.E.2d 126 (1964).

If an infant or insane person has no guardian at the time the cause of action accrues, then the statute begins to run upon the appointment of a guardian or upon the removal of his disability as provided by this section, whichever shall occur first. First-Citizens Bank & Trust Co. v. Willis, 257 N.C. 59, 125 S. E. (2d) 359 (1962); Teele v. Kerr, 261 N.C. 148, 134 S.E.2d 126 (1964).

Action on Judgment Secured during Infancy.—This section permits one to bring an action on a judgment secured during his infancy by a next friend within the time limited by § 1-47 (1), i.e., ten years after he becomes twenty-one years old. Teele v. Kerr, 261 N.C. 148, 134 S.E.2d 126 (1964).

Quoted in Rowland v. Beauchamp, 253 N. C. 231, 116 S. E. (2d) 720 (1960).

Stated in Franklin County v. Jones, 245 N. C. 272, 95 S. E. (2d) 863 (1957).

Cited in Shearin v. Lloyd, 246 N C. 363, 98 S. E. (2d) 508 (1957); Jewell v. Price, 264, N. C. 459, 142 S.E.2d 1 (1965).

§ 1-20. Disability must exist when right of action accrues.

Running of Statute Cannot Be Stopped.—Once the statute begins to run nothing stops it. Fulp v. Fulp, 264 N.C. 20, 140 S.E.2d 708 (1965).

Cited in Shearin v. Lloyd, 246 N. C. 363, 98 S. E. (2d) 508 (1957).

§ 1-21. Defendant out of State; when action begun or judgment enforced.—If when the cause of action accrues or judgment is rendered or docketed against a person, he is out of the State, action may be commenced, or judgment enforced, within the times herein limited, after the return of the person into this State, and if, after such cause of action accrues or judgment is rendered or docketed, such person departs from and resides out of this State, or remains continuously absent therefrom for one year or more, the time of his absence shall not be a part of the time limited for the commencement of the action, or the enforcement of the judgment. Provided, that where a cause of action arose outside of this State and is barred by the laws of the jurisdiction in which it arose, no action may be maintained in the courts of this State for the enforcement thereof, except where the cause of action originally accrued in favor of a resident of this State. (C. C. P., s. 41; 1881, c. 258, ss. 1, 2; Code, s 162; Rev., s. 366; C. S., s 411; 1955, c. 544.)

Editor's Note.—The 1955 amendment added the proviso at the end of the section.

For brief comment on the 1955 amendment, see 33 N. C. Law Rev. 531.

The general purpose of this section, etc.—

The purpose of this section is to prevent defendants from having the benefit of the statute of limitation while they permit debts against them, past due, to remain unpaid, or other causes of action against them to remain undischarged, and keep beyond the limits of the State and the jurisdiction of its courts, and thus prevent the person having the right to sue from doing so. Merchants & Planters Nat. Bank v. Appleyard, 238 N. C. 145, 77 S. E. (2d) 783 (1953).

The words "any person," etc.—

In accord with original. See Merchants & Planters Nat. Bank v. Appleyard, 238 N. C. 145, 77 S. E. (2d) 783 (1953).

The legislature intended the proviso added by the 1955 amendment to be a limited borrowing statute, operating to bar the prosecution in this State of all claims barred either in the state of their origin, or in this State. Little v. Stevens, 267 N.C. 328, 148 S.E.2d 201 (1966).

It Is Not Limitation on Tolling Provisions of Section.—The proviso in this section is not a limitation upon the tolling provisions of the statute but is a limited borrowing statute, operating to bar the prosecution in this State of all claims barred either in the state of their origin or in this State. Broadfoot v. Everett, 270 N.C. 429, 154 S.E.2d 522 (1967).

The 1955 amendment was designed (1) to clarify the law, and (2) to bar stale out-of-state claims. To treat the proviso merely as a limitation on the tolling portion of the statute would accomplish neither of these purposes. Little v. Stevens, 267 N.C. 328, 148 S.E.2d 201 (1966).

Nonresident May Litigate Here Claim Not Barred Where It Arose.—The courts of this State are open to a nonresident plaintiff to enforce a claim on a cause of action that is not barred in the jurisdiction where such cause of action arose, where the debtor has not been a resident of this State for the statutory time necessary to bar the action. This section tolls the statute in such cases where neither the plaintiff nor the defendant is a resident of this State at the time of the institution of the action and never was, as well as in cases where the obligation arose out of the State and the debtor has not resided in the State for a time sufficient to bar the action by the law of this State. Merchants & Planters Nat. Bank v. Appleyard, 238 N. C. 145, 77 S. E. (2d) 783 (1953) (decided prior to addition of proviso in 1955).

But Proviso Bars All Stale Foreign Claims.—Giving the language of the proviso its ordinary meaning, it is a limited borrowing statute which bars all stale foreign claims. Little v. Stevens, 267 N.C. 328, 148 S.E.2d 201 (1966).

If the proviso be treated as a limited borrowing statute, no action barred in the state of origin may be litigated here. Little v. Stevens, 267 N.C. 328, 148 S.E.2d 201 (1966).

Unless They Originally Accrued in Favor of Resident.—This section now bars all stale foreign claims unless they originally accrued in favor of a resident of North Carolina. Broadfoot v. Everett, 270 N.C. 429, 154 S.E.2d 522 (1967).

And Ancillary Administrator Is Not Resident to Whom Wrongful Death Claim Accrues. — The fact that an action for wrongful death is brought by an ancillary administrator appointed in this State does not constitute the action one accruing to a resident of this State within the meaning of the proviso to this section. Broadfoot v. Everett, 270 N.C. 429, 154 S.E.2d 522 (1967).

Hence, Wrongful Death Claim Barred Where It Arose Is Barred Here.—Where at the time a wrongful death action was instituted here, it was barred in Pennsylvannia where it arose, it is also barred in North Carolina. Broadfoot v. Everett, 270 N.C. 429, 154 S.E.2d 522 (1967).

Action Based on Foreign Statute Which Itself Contains Limitation.—When an action is based on a foreign statute which creates a cause or right of action and the statute itself contains a limitation on the time within which the action can be brought, the life of the right of action is limited by that provision and not by the local statutes of limitation. Rios v. Drennan, 209 F. Supp. 927 (1962).

§ 1-22. Death before limitation expires; action by or against executor.

I. GENERAL CONSIDERATION.

Exception to General Rule.—

The general rule is unquestionably that when the statute of limitations once begins to run nothing stops it. But this section has made an exception where a party dies. Hodge v. Perry, 255 N. C. 695, 122 S. E. (2d) 677 (1961).

III. DEATH OF THE DEBTOR.

Running Suspended until Qualification of Administrator.—Where a claim is not barred at the time of the debtor's death, the death suspends the running of the statute until the qualification of an administrator. Prentzas v. Prentzas, 260 N. C. 101, 131 S. E. (2d) 678 (1963).

And Creditor Has One Year Thereafter to Bring Suit.—The creditor has one year from the date of the appointment of the administrator within which to bring suit. Prentzas v. Prentzas, 260 N. C. 101, 131 S. E. (2d) 678 (1963).

§ 1-24. Time during controversy on probate of will or granting letters.

This section has no application where an administrator has been appointed. Hargrave v. Gardner, 264 N.C. 117, 141 S.E.2d 36 (1965).

§ 1-25. New action within one year after nonsuit, etc.

Editor's Note.—

For note as to the effect of restriction of venue after voluntary nonsuit, see 32 N. C. Law Rev. 326.

This section is an enabling statute and should be liberally construed. Rowland v. Beauchamp, 253 N. C. 231, 116 S. E. (2d) 720 (1960).

The very purpose of this section is to afford a second opportunity to a plaintiff if he has been nonsuited because of a deficiency in the evidence. When a defendant offers a motion for nonsuit at the end of the plaintiff's case, and prevails, his victory may prove not to be permanent, for by statute it has the inherent limitation that the plaintiff may within a year make another effort and meet with greater success by supplying the deficiency. If the nonsuited plaintiff brings a new action within the statutory time, it is tried de novo. Of course, if the evidence in the second trial is not substantially different from that in the first, then under the law of North Carolina the same result must follow as in the first case. Hunt v. Bradshaw, 251 F. (2d) 103 (1958).

This section was intended to extend the period of limitation, not to abridge it. Walker v. Story, 256 N. C. 453, 124 S. E. (2d) 113 (1962).

Nonsuit Operates as Res Adjudicata, etc.—

In accord with 1st paragraph in original. See Hunt v. Bradshaw, 145 F. Supp. 322 (1956.)

When a prior action is nonsuited on the ground of insufficiency of plaintiff's evidence, a plea of res judicata on the ground of a prior judgment of compulsory nonsuit can be sustained when, and only when, the allegations and evidence in the two actions

are substantially the same. Powell v. Cross, 268 N.C. 134, 150 S.E.2d 59 (1966).

A plea of res judicata ordinarily cannot be determined on the pleadings in the two actions, the judgment of compulsory nonsuit entered in the prior action on the ground of insufficiency of the evidence, the record of evidence in the prior action on appeal, and the decision of the Supreme Court in respect to the prior action. A plea of res judicata can be determined only after the evidence in the second action is presented. Powell v. Cross, 268 N.C. 134, 150 S.E.2d 59 (1966).

In considering the question as to whether the judgment of compulsory nonsuit is res judicata as to the second action, the evidence to be considered on such motion may not be limited to the evidence that was adduced in the former trial, but contemplates a consideration of all the evidence adduced in support of the allegations of the respective complaints. It is only by a consideration of all such evidence that the court may determine whether or not the evidence in both trials was substantially the same. Pemberton v. Lewis, 243 N.C. 188, 90 S.E.2d 245 (1955); Powell v. Cross, 268 N.C. 134, 150 S.E.2d 59 (1966).

Judgment of Nonsuit on Merits, etc.—When a judgment of nonsuit is entered on the merits and after a full hearing, a subsequent action under this section is barred if the second action is between the same parties and based on substantially identical allegations and evidence. Hayes v. Ricard, 251 N. C. 485, 112 S. E. (2d) 123 (1960).

Second Action a Continuation of Original Action as to Same Defendant.—Where an action for wrongful death is instituted against several defendants and nonsuited for variance, a second action instituted within one year of the nonsuit is a continuation of the original action in so far as a party who is a defendant in both actions, upon substantially similar allegations of negligence, is concerned, notwithstanding that some of the parties defendant in the first action were not joined in the second and the fact that parties were joined as defendants in the second action who were not defendants in the first. Hall v. Carroll, 253 N. C. 220, 116 S. E. (2d) 459 (1960).

Section Annexes Two Conditions to Right to Bring Another Action after Nonsuit.—Even though a plaintiff's cause of action may be otherwise barred, this section permits a plaintiff who has been nonsuited to bring another action to redress the asserted wrong. But this section annexes two conditions to the right: (1) The new suit must be brought within one year from the nonsuit. (2) Plaintiff must pay the costs awarded against him in the prior action if he did not sue as a pauper. Plaintiff in the instant action admittedly had not paid the costs awarded against her. That failure deprived her of the benefit of the statute. Nowell v. Hamilton, 249 N. C. 523, 107 S. E. (2d) 112 (1959).

Finality of Judgment on Appeal. — Where appeal is taken from a county court to the superior court from a judgment of involuntary nonsuit, the appeal not being perfected, the judgment does not become final, in the sense that it ends the action, until judgment is entered dismissing the appeal, and a new action may be instituted within one year thereafter. Rowland v. Beauchamp, 253 N. C. 231, 116 S. E. (2d) 720 (1960).

Taking of Nonsuit Is Tantamount to Withdrawal of Appeal.—When a demurrer to the complaint filed in an action has been sustained and the plaintiff gives notice of appeal to the Supreme Court, but instead of perfecting the appeal he elects to take a voluntary nonsuit and brings another action pursuant to the provisions of this section, the taking of a voluntary nonsuit before the clerk of the superior court is tantamount to an abandonment or withdrawal of the appeal. Leggett v. Smith-Douglass Co., Inc., 257 N. C. 646, 127 S. E. (2d) 222 (1962).

Applied in Nowell v. Neal, 249 N. C. 516, 107 S. E. (2d) 107 (1959); Bryant v. Dougherty, 270 N.C. 748, 155 S.E.2d 181 (1967); Carroll v. Seaboard Air Line R.R., 371 F.2d 903 (4th Cir. 1967).

Cited in McDonald v. McCrummen, 235 N. C. 550, 70 S. E. (2d) 703 (1952); Skipper v. Yow, 240 N. C. 102, 81 S. E. (2d) 200 (1954); Bowen v. Darden, 241 N. C. 11, 84 S. E. (2d) 289 (1954); W. E. Linthicum & Sons v. Kelly Constr. Co., 246 N. C. 203, 97 S. E. (2d) 863 (1957); Johnson v. Lamar, 250 N. C. 731, 110 S. E. (2d) 323 (1959); First-Citizens Bank & Trust Co. v. Willis, 257 N. C. 59, 125 S. E. (2d) 359 (1962); Whitaker v. Beasley, 261 N.C. 733, 136 S.E.2d 127 (1964); Little v. Stevens, 267 N.C. 328, 148 S.E.2d 201 (1966).

§ 1-26. New promise must be in writing.

I. GENERAL CONSIDERATION.

Editor's Note.—The legislature rewrote § 1-27 by the 1953 amendment to that section. As rewritten, § 1-27 in effect reverses Green v. Greensboro Female College, 83 N. C. 449 (1880), noted in the recompiled volume under this and other sections, and the cases which have applied the law as there declared. A payment by a joint obligor does not now fix the date of such acknowledgment or payment as a new date from which the statute begins to run, except as to him, unless such payment is authorized or ratified. See Pickett v. Rigsbee, 252 N. C. 200, 113 S. E. (2d) 323 (1960).

For comment on application of statute of limitations to promise of grantee assuming mortgage or deed of trust, see 43 N.C.L. Rev. 966 (1965).

II. ACKNOWLEDGMENT OR NEW PROMISE.

A new promise to pay fixes a new date from which the statute of limitations runs, but such promise, to be binding, must be in writing as required by this section. Pickett v. Rigsbee, 252 N. C. 200, 113 S. E. (2d) 323 (1960).

III. PART PAYMENT.

Same—Principal and Surety.—A principal and surety are joint or co-obligors. A written acknowledgment or payment by one is binding on the other. Pickett v. Rigsbee, 252 N. C. 200, 113 S. E. (2d) 323 (1960). But see Editor's Note above.

§ 1-27. Act, admission or acknowledgment by party to obligation, co-obligor or guarantor.—(a) After a cause of action has accrued on any obligation on which there is more than one obligor, any act, admission, or acknowledgment by any party to such obligation, or guarantor thereof, which removes the bar of the statute of limitations or causes the statute to begin running anew, has such effect only as to the party doing such act or making such admission or acknowledgment, and shall not renew, extend or in any manner impose liability of any kind against other parties to such obligation who have not authorized or ratified the same

(b) Nothing in this section shall be construed as applying to or affecting rights or obligations of partnerships or individual members thereof, due to acts, admissions or acknowledgments of any one partner but rights as between partners shall be governed by G. S. 59-39.1. (C. C. P., s. 50; Code, s. 171; Rev., s. 372; C. S., s. 417; 1953, c. 1076, s. 1.)

Editor's Note. — The 1953 amendment, effective July 1, 1953, rewrote this section. For comment on admendment, see 31 N. C. Law Rev. 397.

The legislature rewrote this section by the 1953 amendment. As rewritten, this section in effect reverses Green v. Greensboro Female College, 83 N. C. 449 (1880), noted in the recompiled volume under this and other sections, and the cases which have applied the law as there declared. A payment by a joint obligor does not now fix the date of such acknowledgment or payment as a new date from which the statute begins to run, except as to him, unless such payment is authorized or ratified. See Pickett v. Rigsbee, 252 N. C. 200, 113 S. E. (2d) 323 (1960).

For comment on application of statute of limitations to promise of grantee assuming mortgage or deed of trust, see 43 N.C.L. Rev. 966 (1965).

Section Changed Law.—

The correct citation to Green v. Greensboro Female College, cited in the second paragraph under this catchline in the recompiled volume, is 83 N. C. 449 (1880).

Partial Payment Prior to Dissolution or Bar.—

The correct citation to Green v. Greensboro Female College, cited in the second paragraph under this catchline in the recompiled volume, is 83 N. C. 449 (1880)

§ 1-30. Applicable to actions by State.

Cited in City of Reidsville v. Burton, 269 N.C. 206, 152 S.E.2d 147 (1967).

Article 4.

Limitations, Real Property.

§ 1-35. Title against State.

Statute as Plea in Bar to Preclude References. — See note to § 1-189, analysis line II.

Cited in United States v. Burnette, 103 F. Supp. 645 (1952).

§ 1-36. Title presumed out of State.

Purpose of Section.—

In accord with 1st paragraph in original. See Williams v. Robertson, 235 N. C 478, 70 S. E. (2d) 692 (1952); McDonald v McCrummen, 235 N. C. 550, 70 S. E. (2d) 703 (1952); Powell v. Mills, 237 N. C. 582, 75 S. E. (2d) 759 (1953).

It is not necessary to prove that the sovereign has parted with its title when it is not a party to the action. Cothran v. Akers Motor Lines, Inc., 257 N. C. 782, 127 S. E. (2d) 578 (1962).

No Presumption in Favor of One Party or the Other.—Under this section, in all actions involving title to real property, title is conclusively presumed to be out of the State unless it be a party to the action, but there is no presumption in favor of one party or the other, nor is a litigant seeking to recover land otherwise relieved of the burden of showing title in himself Locklear v. Oxendine, 233 N. C. 710, 65 S. E. (2d) 673 (1951); Norman v. Williams, 241 N. C. 732, 86 S. E. (2d) 593 (1955); Scott v. Lewis, 246 N. C. 298, 98 S. E. (2d) 294 (1957); Tripp v. Keais, 255 N. C. 404 121 S. E. (2d) 596 (1961).

Applied in Sessoms v. McDonald, 237 N. C. 720, 75 S. E. (2d) 904 (1953).

Cited in Shingleton v. North Carolina Wildlife Resources Comm., 248 N. C. 89, 102 S. E. (2d) 402 (1958).

§ 1-37. Such possession valid against claimants under State.

Cited in United States v. Burnette, 103 F. Supp. 645 (1952).

§ 1-38. Seven years possession under color of title.—When a person or those under whom he claims is and has been in possession of any real property, under known and visible lines and boundaries and under color of title, for seven years, no entry shall be made or action sustained against such possessor by a person having any right or title to the same, except during the seven years next after his right or title has descended or accrued, who in default of suing within that time shall be excluded from any claim thereafter made; and such possession, so held, is a perpetual bar against all persons not under disability: Provided, that commissioner's deeds in judicial sales and trustee's deeds under foreclosure shall also constitute color of title. (C. C. P., s. 20; Code, s. 141; Rev., s. 382; C. S., s. 428; 1963, c. 1132.)

I. GENERAL NOTE ON ADVERSE POSSESSION.

A. General Consideration.

Editor's Note.—

The 1963 amendment added the proviso at the end of the section.

For note on intent as a requisite in mistaken boundary cases, see 33 N. C. Law Rev. 632. For note in tax foreclosure deed to property held by tenants in common as color of title, see 36 N. C. Law Rev. 526.

Definition.—

In accord with original. See Mallet v. Huske, 262 N.C. 177, 136 S.E.2d 553 (1964).

There must be known and visible boundaries, etc.—

In accord with original. See McDaris v. Breit Bar "T" Corp., 265 N.C. 298, 144 S.E.2d 59 (1965).

Hostile Act Does Not Start Running of Statute against Owner in Possession.—In determining when the owner of real estate must assert his rights against an adverse claim, the rule is that an owner in possession is not required to take notice of a hostile claim. Accordingly, the hostile act or claim of a person not in possession ordinarily does not start the statute of limitations to running against an owner in possession and occupancy. The foregoing rule applies to an equitable owner in possession of land, and so long as he retains possession, nothing else appearing, the statute of limitations does not run against him. Solon Lodge v. Ionic Lodge, 247 N. C. 310, 101 S. E. (2d) 8 (1957).

Effect of Holding Portion of Land, etc.—

In accord with original. See Wachovia Bank & Trust Co. v. Miller, 243 N. C. 1, 89 S. E. (2d) 765 (1955).

When one enters into possession under colorable title which describes the land by definite lines and boundaries, his possession is extended, by operation of law, to the outer boundaries of his deed. But where two or more adjoining tracts of land are conveyed in one deed, or in separate deeds, by separate and distinct descriptions, the actual possession by grantee of one of the tracts for seven years is not constructively extended to the other tract or tracts so as to ripen title thereto by adverse possession. Morehead v. Harris, 262 N.C. 330, 137 S.E.2d 174 (1964).

Color of Title Affords No Protection Where Requisites of Adverse Possession Are Not Present.—A deed, which is color of title, does not draw to the grantee-occupant of the land described therein the protection of the statute of limitations where the requisites of adverse possession are not present. Morehead v. Harris, 262 N.C. 330, 137 S.E.2d 174 (1964).

Generally speaking, a claim of title by adverse possession must be pleaded under North Carolina law. United States v. Chatham, 208 F. Supp. 220 (1962).

But This Applies Only When Adverse Possession Is Set Up as Defense.—The requirement that a claim of title by adverse possession must be pleaded applies only when adverse possession is set up as a defense to an action. United States v. Chatham, 208 F. Supp. 220 (1962).

And Not Where Claim Is Based on Adverse Possession under Color of Title.—The requirement that a claim of adverse possession must be pleaded does not apply when a claim of title is based upon adverse possession under color of title. United States v. Chatham, 208 F. Supp. 220 (1962)

Plea Raises Issue of Fact upon Which Defendant Has Burden of Proof.—Where plaintiff in an action to quiet title establishes a prima facie case, defendant's plea of title by adverse possession under color for seven years does not justify nonsuit of plaintiff's cause, since the plea of adverse possession raises an issue of fact for the jury upon which defendant has the burden of proof. Barbee v. Edwards, 238 N. C. 215, 77 S. E. (2d) 646 (1953).

Mere Admission of Possession Does Not Amount to Admission of Adverse Possession.—Plaintiff's admission that he gave a certain person possession more than seven years prior to the institution of the action does not justify nonsuit of plaintiff's cause of action to quiet title, since mere admission of possession, without evidence in respect to the nature or character of such possession, does not amount to an admission of adverse possession in law, even if defendant be given the benefit of presumptions arising from mesne conveyances from such person. Barbee v. Edwards, 238 N. C. 215, 77 S. E. (2d) 646 (1953).

Plea of Statute as Plea in Bar to Preclude Reference. — See note to § 1-189, analysis line II.

B. Character of Possession.

Mere possession does not necessarily amount to adverse possession in law. Barbee v. Edwards, 238 N. C. 215, 77 S. E. (2d) 646 (1953).

Possession Must Be Actual, Open, Visible, Notorious, Continuous and Hostile.—Under either § 1-38 or § 1-40, in order to bar the true owner of land from recovering it from an occupant in adverse possession, the possession relied on must have been actual, open, visible, notorious, continuous, and hostile to the true owner's title and to all persons, for the full statutory period. Newkirk v. Porter, 237 N. C. 115, 74 S. E. (2d) 235 (1953).

To convert the shadow of color of title into perfect title, possession must be continuous, open, notorious, as well as adverse. It must be of such character as to put the true owner on notice of the adverse claim. It must suffice to subject the occupant to an action in ejectment as distinguished from a mere trespass quare clausum fregit. Bowers v. Mitchell, 258 N. C. 80, 128 S. E. (2d) 6 (1962).

Sufficiency of Possession—Test for Determining Sufficiency.—

A possession that ripens into title must be such as continually subjects some portion of the disputed land to the only use of which it is susceptible, or it must be an actual and continuous occupation of a house or the cultivation of a field, however small, according to the usages of husbandry. The test is involved in the question whether the acts of ownership were such as to subject the claimant continually during the whole statutory period to an action in the nature of trespass in ejectment instead of to one or several actions of trespass quare clausum fregit for damages. Mallet v. Huske, 262 N.C. 177, 136 S.E.2d 553 (1964), citing Shaffer v. Gaynor, 117 N.C. 15, 23 S.E. 154 (1895).

Same—Payment of Taxes.—

The listing and payment of taxes would not suffice to support an action in ejectment or trespass, which is the test of pos-

session referred to in §§ 1-38 and 1-40. Chisholm v. Hall, 255 N. C. 374, 121 S. E. (2d) 726 (1961).

That defendants listed and paid the taxes is evidence of the character of their claim, but it is no evidence of actual possession. Chisholm v. Hall, 255 N. C. 374, 121 S. E. (2d) 726 (1961).

Continuity and Duration.—

Continuity of possession being one of the essential elements of adverse possession, in order that title may be ripened thereby, such possession must be shown to have been continuous and uninterrupted for the full statutory period. This for the reason that if the possession of the adverse claimant be broken, the constructive possession of the true owner intervenes and destroys the effectiveness of the prior possession. Newkirk v. Porter, 237 N. C. 115, 74 S. E. (2d) 235 (1953).

Occasional acts of ownership, no matter how adverse, do not constitute a possession that will mature title. Sessoms v. McDonald, 237 N. C. 720, 75 S. E. (2d) 904 (1953).

Tacking Possession—Privity.—

The principle prevails in this State that several successive possessions may be tacked for the purpose of showing a continuous adverse possession where there is privity of estate or connection of title between several successive occupants. Scott v. Lewis, 246 N. C. 298, 98 S. E. (2d) 294 (1957.)

In order to fulfill the requirements as to continuity of possession, it is not necessary that an adverse possession be maintained for the entire statutory period by one person. Continuity may be shown by the tacking of successive possessions of two or more persons between whom the requisite privity exists. The privity referred to is only that of possession and may be said to exist whenever one holds the property under or for another or in subordination to his claim and under an agreement or arrangement recognized as valid between themselves. Newkirk v. Porter, 237 N. C. 115, 74 S. E. (2d) 235 (1953).

Where parties bring action for the recovery of land as heirs at law of their ancestor and judgment is rendered in the action adverse to them, such judgment adjudicates want of title in their ancestor and is binding upon them, and they may not in a subsequent action, in which they assert title by adverse possession, tack the possession of their ancestor or contend that their separate acts of ownership were done in the character of heirs at law claiming under the known and definite boundaries. Scott v. Lewis, 246 N. C. 298, 98 S. E. (2d) 294 (1957).

A grantee claiming land within the boundaries called for in the deed or other instrument constituting color of title, may tack his grantor's possession of such land to his own for the purpose of establishing adverse possession for the purpose of the requisite statutory period. Similarly, the adverse possession of an ancestor may be cast by descent upon his heirs and tacked to their possession for the purpose of showing title by adverse possession. Newkirk v. Porter, 237 N. C. 115, 74 S. E. (2d) 235 (1953).

A deed does not of itself create privity between the grantor and the grantee as to land not described in the deed but occupied by the grantor in connection therewith, and this is so even though the grantee enters into possession of the land not described and uses it in connection with that conveyed. Newkirk v. Porter, 237 N. C. 115, 74 S. E. (2d) 235 (1953).

For note on tacking successive adverse possessions of a strip of land not included in a deed, see 31 N. C. Law Rev. 478.

Where an heir goes into adverse possession of a tract of land, but the ancestor dies before such possession has been held for twenty years, such possession prior to the ancestor's death may not be tacked to the heir's possession subsequent to the ancestor's death, and such heir's possession for less than twenty years subsequent to the ancestor's death does not ripen title in him. Wilson v. Wilson, 237 N. C. 266, 74 S. E. (2d) 704 (1953).

Possession of a single tract is not constructively extended to a separate and distinct tract even though both tracts are described in the same conveyance. Bowers v. Mitchell, 258 N. C. 80, 128 S. E. (2d) 8 (1962).

Conflicting evidence as to the character or extent of the possession under color of title by adverse possession raises the issue for the determination of the jury. Bumgarner v. Corpening, 246 N. C. 40, 97 S. E. (2d) 427 (1957).

II. NOTE TO SECTION 1-38.

Section Applies to State and Its Agencies.—The General Assembly intended that this section and § 1-40 should apply to any legal entity, including the State of North Carolina and its agencies, capable of adversely possessing land and of acquiring title thereto. Williams v. North Carolina State Bd. of Educ., 266 N.C. 761, 147 S.E.2d 381 (1966).

Adverse possession, to ripen into title after seven years, must be under color, otherwise a period of twenty years is required under § 1-40. Justice v. Mitchell, 238 N. C. 364, 78 S. E. (2d) 122 (1953).

Where adverse possession is under color of title seven years holding can secure a fee. Williams v. Weyerhaeuser Co., 378 F. 2d 7 (4th Cir. 1967).

The possession has to be under color of title. United States v. Chatham, 208 F. Supp 220 (1962).

Twenty-Year Limitation Applies to Holding without Color.—Where defendant in a quia timet suit defends on grounds other than adverse possession, the statutory period of holding is twenty years where without color of title. Williams v. Weyerhaeuser Co., 378 F.2d 7 (4th Cir. 1967).

Color of Title Defined. — Color of title is a paper writing which purports to convey land but fails to do so. First-Citizens Bank & Trust Co. v. Parker, 235 N. C. 326, 69 S. E. (2d) 841 (1952); Carrow v. Davis, 248 N. C. 740, 105 S. E. (2d) 60 (1958).

Sufficiency of Paper to Constitute Color.—

If the instrument on its face purports to convey land by definite lines and boundaries and the grantee enters into possession claiming under it and holds adversely for seven years, it is sufficient to vest title to the land in the grantee. No exclusive importance is to be attached to the ground of the invalidity of the colorable title if entry thereunder has been made in good faith and possession held adversely. Though the grantor may have been incompetent to convey the true title or the form of conveyance be defective, it will constitute color of title which will draw to the possession of the grantee thereunder the protection of the statute. First-Citizens Bank & Trust Co. v. Parker, 235 N. C. 326, 69 S. E. (2d) 841 (1952); Johnson v. McLamb, 247 N. C. 534, 101 S. E. (2d) 311 (1958).

Same—Valid Deed.—A valid deed is not color of title. When one gives a deed for lands for a valuable consideration, and the grantee fails to register it, but enters into possession thereunder and remains therein for more than seven years, such deed does not constitute color of title. Justice v Mitchell, 238 N C. 364, 78 S. E. (2d) 122 (1953)

Same—Fraudulent Deed.—A fraudulent deed may be color of title and become a good title if the fraudulent grantee holds actual adverse possession for the statutory period against the owner who has right of action to recover possession and is under no disability. First-Citizens Bank & Trust Co. v. Parker, 235 N. C. 326, 69 S. E. (2d) 841 (1952); Johnson v. McLamb, 247 N. C. 534, 101 S. E. (2d) 311 (1958).

Same—Deed Made in Defective Partition Proceedings.—Where in a partition proceeding to sell land less than the whole number of tenants in common have been made parties, a deed made pursuant to an order of court to the purchaser is color of title and seven years adverse possession thereunder will bar those tenants in common who were not made parties. First-Citizens Bank & Trust Co. v. Parker, 235 N. C. 326, 69 S. E. (2d) 841 (1952); Johnson v. McLamb, 247 N. C. 534, 101 S. E. (2d) 311 (1958).

Where a sale is made pursuant to court order in a partition proceeding and some of the cotenants are not parties, or there is an actual partition among those parties, the deed or the decree of partition is not the act of a cotenant, but is the act of a stranger, and seven years' possession under the deed or decree confirming the partition suffices to ripen title. Yow v. Armstrong, 260 N.C. 287, 132 S.E.2d 620 (1963).

Same — Commissioner's Deed in Tax Foreclosure Proceedings. — Commissioner's deed in tax foreclosure proceedings instituted against one tenant in common is color of title as against the cotenants who were not parties to the foreclosure. Johnson v. McLamb, 247 N. C. 534, 101 S. E. (2d) 311 (1958).

Same—Decree in Condemnation.—A decree in condemnation was color of title, and the adverse possession of the United States of America under this decree of condemnation under known and visible boundaries for a period of seven years as required by this section was sufficient to cure any defects in the title conveyed by the decree of condemnation. United States v. Chatham, 208 F. Supp 220 (1962).

Same — Description of Property Involved.—A deed offered as color of title is such only for the land designated and described in it. Davidson v. Arledge, 88 N. C. 326 (1883); Smith v. Fite, 92 N. C. 319 (1885); Barker v. Southern Ry. Co., 125 N. C. 596, 34 S. E. 701 (1899); Johnston v. Case, 131 N. C. 491, 42 S. E. 957 (1902); Smith v. Benson, 227 N. C. 56, 40 S E. (2d) 451 (1946); Locklear v. Oxendine, 233 N. C. 710, 65 S. E. (2d) 673 (1951); Williams v. Robertson, 235 N. C. 478, 70 S. E. (2d) 692 (1952); Powell v. Mills, 237 N. C. 582, 75 S. E. (2d) 759 (1953); Norman v. Williams, 241 N. C. 732, 86 S E. (2d) 593 (1955); McDaris v. Breit Bar

"T" Corp., 265 N.C. 298, 144 S.E.2d 59 (1965).

And the description in the deed must by proof be made to fit the land it covers. Smith v. Benson, 227 N. C. 56, 40 S. E. (2d) 451 (1946); Locklear v. Oxendine, 233 N. C. 710, 65 S. E. (2d) 673 (1951); Williams v. Robertson, 235 N. C. 478, 70 S. E. (2d) 692 (1952); Powell v. Mills, 237 N. C. 582, 75 S. E. (2d) 759 (1953); McDaris v. Breit Bar "T" Corp., 265 N.C. 298, 144 S.E.2d 59 (1965). See the headnote to Smith v. Fite, 92 N.C. 319 (1885), quoted or stated in each of the foregoing cases: "Where a party introduces a deed in evidence, which he intends to be used as color of title, he must prove that its boundaries cover the land in dispute, to give legal efficacy to his possession."

Therefore, a deed which is inoperative because the land intended to be conveyed is incapable of identification from the description therein is inoperative as color of title. Dickens v. Barnes, 79 N. C. 490 (1878); Barker v. Southern Ry. Co., 125 N. C. 596, 34 S. E. 701 (1899); Fincannon v. Sudderth, 144 N. C. 587, 57 S. E. 337 (1907); Katz v. Daughtrey, 198 N. C. 393, 151 S. E. 879 (1930); Thomas v. Hipp, 223 N. C. 515, 27 S. E. (2d) 528 (1943); Powell v. Mills, 237 N. C. 582, 75 S. E. (2d) 759 (1953); Carrow v. Davis, 248 N. C. 740, 105 S. E. (2d) 60 (1958).

A deed cannot be color of title to land in general, but must attach to some particular tract. McDaris v. Breit Bar "T" Corp., 265 N.C. 298, 144 S.E.2d 59 (1965).

To constitute color of title a deed must contain a description identifying the land or referring to something that will identify it with certainty. McDaris v. Breit Bar "T" Corp., 265 N.C. 298, 144 S.E.2d 59 (1965).

When a party introduces a deed in evidence which he intends to use as color of title, he must not only offer the deed upon which he relies for color of title, he must by proof fit the description in the deed to the land it covers—in accordance with appropriate law relating to course and distance, and natural objects and other monuments called for in the deed. McDaris v. Breit Bar "T" Corp., 265 N.C. 298, 144 S.E.2d 59 (1965).

Color of Title Does Not Relate Back to Time of Entry.—Though a person originally entering without color of title may on subsequent acquisition of color be deemed to have held adversely under color from the latter date, still his color of title does not relate back to the time of his entry. Justice v Mitchell, 238 N. C. 364, 78 S. E. (2d) 122 (1953).

Where the only color of title set up in the complaint is a deed executed less than seven years before the institution of the action, the complaint does not state a cause of action for the acquisition of title by adverse possession under color of title. Washington v. McLawhorn, 237 N. C. 449, 75 S. E. (2d) 402 (1953).

Description in Deed Enlarged in Subsequent Deeds in Chain of Title.—Where the description in the deed from the common source of title is enlarged in descriptions in subsequent deeds in the chain of title, the party claiming the additional land by adverse possession under color of title must show actual possession of the additional land, since possession under the deed from the common source could not be constructively extended to include the additional land. Bumgarner v. Corpening, 246 N. C. 40, 97 S. E. (2d) 427 (1957).

Where the parties claim under deeds from a common source calling for a road as the dividing line between the tracts, but subsequent deeds in the chain of title of respondents describe the land by specific description without reference to the road, respondents are entitled to claim the land encompassed in the description in the intermediate deeds as under color of title, and when they offer evidence of adverse possession under their deeds, an instruction limiting their claim to the road as it existed at the time of the execution of the deeds from the common source, is error. Bumgarner v. Corpening, 246 N. C. 40, 97 S. E. (2d) 427 (1957)

Color of title is not sufficient to make a prima facie case of title. Cothran v. Akers Motor Lines, Inc., 257 N. C. 782, 127 S. E. (2d) 578 (1962).

But Must Be Strengthened by Possession.—The color must be strengthened by possession, which must be open, notorious, and adverse for a period of seven years. Cothran v. Akers Motor Lines, Inc., 257 N. C. 782, 127 S. E. (2d) 578 (1962).

Character of Possession under Section.—Possession must be adverse; that is, title must be claimed against all the world. United States v. Chatham, 208 F. Supp. 220 (1962).

Possession Must Be Such as to Make Adverse Claimant Liable to Action of Ejectment.—In order to ripen a colorable title into a good title, there must be such possession and acts of dominion by the colorable claimant as will make him liable to an action of ejectment. Justice v. Mitchell, 238 N. C. 364, 78 S. E. (2d) 122 (1953).

And So Notorious as to Put True Owner on Notice of Adverse Claim.—The rule requiring physical possession so notorious as to put the true owner on notice of the adverse claim in order to mature claimant's title is as well settled as the rule requiring plaintiff to establish his title. Cothran v. Akers Motor Lines, Inc., 257 N. C. 782, 127 S. E. (2d) 578 (1962).

Possession by the grantee of a life tenant is not adverse to the rights of the remaindermen during the life of the life tenant. The seven-year statute of limitation prescribed by this section does not begin to run against the remaindermen until the life tenant dies. Sprinkle v. Reidsville, 235 N. C. 140, 69 S. E. (2d) 179 (1952).

The grantee in a deed conveying only the life estate of the grantor cannot hold adversely to the remaindermen until the death of the grantor, and where one of the remaindermen is then under the disability of infancy the grantee cannot acquire title by adverse possession against him under color of the deed until after the lapse of seven years from the removal of the disability. Lovett v. Stone, 239 N. C. 206, 79 S. E. (2d) 479 (1954).

Evidence of adverse possession held sufficent to be submitted to the jury under claim of title by seven years adverse possession under color. Newkirk v. Porter, 240 N. C. 296, 82 S. E. (2d) 74 (1954).

Cited in United States v. Burnette, 103 F. Supp. 645 (1952); Wilson v. Chandler, 235 N. C. 373, 70 S. E. (2d) 179 (1952); Chambers v. Chambers, 235 N. C. 749, 71 S. E. (2d) 57 (1952); Waddell v. Carson, 245 N. C. 669, 97 S. E. (2d) 222 (1957); Morehead v. Harris, 255 N. C. 130, 120 S. E. (2d) 425 (1961); Lane v. Lane, 255 N. C. 444, 121 S. E. (2d) 893 (1961); Mallet v. Huske, 262 N.C. 177, 136 S.E.2d 553 (1964); Patterson v. Buchanan, 265 N.C. 214, 143 S.E.2d 76 (1965).

§ 1-39. Seizin within twenty years necessary.

This section and § 1-42 are construed together. Barbee v. Edwards, 238 N. C. 215, 77 S. E. (2d) 646 (1953); Elliott v. Goss, 250 N. C. 185, 108 S. E. (2d) 475 (1959).

This section and § 1-42 are to be construed together. When so construed, the rule is as follows: It is not necessary that a plaintiff in an action to recover land should allege in his complaint that he had possession within twenty years before action brought; for, if he establishes on the trial a legal title to the premises, he will be presumed to have been possessed thereof within the time required by law, unless it is made to appear that such premises have been held and possessed adversely to such legal title for the time prescribed by law before the commencement of such action. Williams v. North Carolina State Bd. of Educ., 266 N.C. 761, 147 S.E.2d 381 (1966).

Failure to Allege Seizin Not Ground for Demurrer.—In an action for possession of land failure to affirmatively allege that plaintiff had been seized or possessed of the premises within twenty years prior to the institution of the action is not ground for demurrer. Elliott v. Goss, 250 N. C. 185, 108 S. E. (2d) 475 (1959).

Applied in Tripp v. Keais, 255 N. C. 404, 121 S. E. (2d) 596 (1961).

Cited in Williams v. Robertson, 235 N. C. 478, 70 S. E. (2d) 692 (1952); Washington v. McLawhorn, 237 N. C. 449, 75 S. E. (2d) 402 (1953).

§ 1-40. Twenty years adverse possession.

Section Applies to State and Its Agencies.—The General Assembly intended that this section and § 1-38 should apply to any legal entity, including the State of North Carolina and its agencies, capable of adversely possessing land and of acquiring title thereto. Williams v. North Carolina State Bd. of Educ., 266 N.C. 761, 147 S.E.2d 381 (1966).

The plaintiffs' unregistered deed does not prevent their setting up adverse possession for twenty years. Sessoms v. McDonald, 237 N. C. 720, 75 S. E. (2d) 904 (1953).

Tenants in Common—Possession of One, etc.—

See Battle v. Battle, 235 N. C. 499, 70 S. E. (2d) 492 (1952).

In accord with 1st paragraph in original. See Williams v. Robertson, 235 N. C. 478, 70 S. E. (2d) 692 (1952).

Adverse possession, even under color of title, will not ripen title as against a tenant in common short of twenty years. Williams v. Robertson, 235 N. C. 478, 70 S. E. (2d) 692 (1952).

The possession of one tenant in common is in law the possession of all his cotenants, unless and until there has been an actual ouster or a sole adverse possession of twenty years, receiving the rents and claiming the land as his own, from which actual ouster would be presumed. Morehead v. Harris, 262 N.C. 330, 137 S.E.2d 174 (1964).

In the absence of an actual ouster, the

ouster of one tenant in common by a cotenant will not be presumed from an exclusive use of the common property and the appropriation of its profits to his own use for a less period than twenty years, and the result is not changed when one enters to whom a tenant in common has by deed attempted to convey the entire tract. Morehead v. Harris, 262 N.C. 330, 137 S.E.2d 174 (1964).

One may assert title to land embraced within the bounds of another's deed, etc.—

In accord with original. See Scott v. Lewis, 246 N. C. 298, 98 S. E. (2d) 294 (1957).

There can be no constructive possession by one holding land adversely unless he holds under color of title. Carswell v. Morganton, 236 N. C. 375, 72 S. E. (2d) 748 (1952).

Adverse Possessor Cannot Enlarge Rights beyond Limits of Actual Possession.—An adverse possessor of land without color of title cannot acquire title to any greater amount of land than that which he has actually occupied for the statutory period. He cannot enlarge his rights beyond the limits of his actual possession by a claim of title to other land abutting that which he actually occupies, even though such other land may be defined by marked boundaries. Carswell v. Morganton, 236 N. C. 375, 72 S. E. (2d) 748 (1952).

Where the plaintiffs rely upon adverse possession alone without color of title, title acquired under such circumstances is confined to the lands actually occupied. An adverse possessor of land without color of title cannot acquire title to any greater amount of land than that which he has actually occupied for the statutory period. Sessoms v. McDonald, 237 N. C. 720, 75 S. E. (2d) 904 (1953).

Several successive possessions may be tacked for the purpose of showing a continuous adverse possession where there is privity of estate or connection of title between several occupants. Williams v. Robertson, 235 N. C. 478, 70 S. E. (2d) 692 (1952).

The adverse possession of an ancestor may be cast by descent upon his heirs and tacked to their possession for the purpose of showing title by adverse possession. International Paper Co. v. Jacobs, 258 N. C. 439, 128 S. E. (2d) 818 (1963).

Where There Was No Hiatus or Interruption in Possession.—To establish possession for the requisite twenty years, it is permissible to tie the possession of an ancestor to that of the heir when there was no hiatus or interruption in the possession. International Paper Co. v. Jacobs, 258 N. C. 439, 128 S. E. (2d) 818 (1963).

Deed Held Inoperative to Fix "Known and Visible Lines and Boundaries".—The deed relied on by plaintiffs being inoperative as color of title, the description therein was equally inoperative to fix "known and visible lines and boundaries" as the basis for a claim of adverse possession for twenty years. Powell v. Mills, 237 N. C. 582, 75 S. E. (2d) 759 (1953).

Effect of Appointment of Receiver. — When a statute of limitations has begun to run, no subsequent disability will stop it, and ordinarily the mere appointment of a receiver will not toll the statute unless the circumstances are such that such appointment precludes the institution of suit. Thus, when a receiver has full authority to institute suit, as in the instant case, his appointment will not suspend the running of limitations under this section. Nicholas v. Salisbury Hardware & Furniture Co., 248 N. C. 462, 103 S. E. (2d) 837 (1958).

Compulsory Reference.—

As to statute of limitations as plea in bar to defeat order of reference, see note to § 1-189, analysis line II.

Evidence Sufficient to Take Question of Adverse Possession to Jury.—See Chambers v. Chambers, 235 N. C. 749, 71 S. E. (2d) 57 (1952), reh. denied 236 N. C. appx.

Evidence held sufficient to overrule nonsuit in plaintiffs' action to establish title to land by adverse possession. Everett v. Sanderson, 238 N. C. 564, 78 S. E. (2d) 408 (1953).

Evidence Held Insufficient. — Plaintiff claimed that his predecessor in title went into possession of two tracts of land through a tenant who possessed both tracts of land for at least twenty years without color of title. Plaintiff's evidence tended to show that the tenant actually occupied only a few acres of one of the tracts, without evidence tending to describe, identify, or locate the particular land actually occupied. It was held that nonsuit was properly entered Carswell v. Morganton, 236 N. C. 375, 72 S. E. (2d) 748 (1952).

Evidence offered was insufficient to identify the lines and boundaries of any particular portion in actual possession. Scott v. Lewis, 246 N. C. 298, 98 S. E. (2d) 294 (1957).

Applied in Newkirk v. Porter, 237 N. C. 115, 74 S. E. (2d) 235 (1953); Chisholm

v. Hall, 255 N. C. 374, 121 S. E. (2d) 726 (1961).

Stated in Jenkins v. Trantham, 244 N. C. 422, 94 S. E. (2d) 311 (1956).

Cited in Wilson v. Chandler, 235 N. C. 373, 70 S. E. (2d) 179 (1952); Washington v. McLawhorn, 237 N. C. 449, 75 S. E. (2d) 402 (1953); Justice v. Mitchell, 238 N. C. 364, 78 S. E. (2d) 122 (1953); Newkirk v. Porter, 240 N. C. 296, 82 S. E. (2d) 74 (1954); Morehead v. Harris, 255 N. C. 130, 120 S. E. (2d) 425 (1961); Lane v. Lane, 255 N. C. 444, 121 S. E. (2d) 893 (1961); Patterson v. Buchanan, 265 N.C. 214, 143 S.E.2d 76 (1965).

§ 1-42. Possession follows legal title; severance of surface and subsurface rights.—In every action for the recovery or possession of real property, or damages for a trespass on such possession, the person establishing a legal title to the premises is presumed to have been possessed thereof within the time required by law; and the occupation of such premises by any other person is deemed to have been under, and in subordination to, the legal title, unless it appears that the premises have been held and possessed adversely to the legal title for the time prescribed by law before the commencement of the action. Provided that a record chain of title to the premises for a period of thirty years next preceding the commencement of the action, together with the identification of the lands described therein, shall be prima facie evidence of possession thereof within the time required by law.

In all controversies and litigation wherein it shall be made to appear from the public records that there has been at some previous time a separation or severance between the surface and the subsurface rights, title or properties of an area, no holder or claimant of the subsurface title or rights therein shall be entitled to evidence or prove any use of the surface, by himself or by his predecessors in title or of lessees or agents, as adverse possession against the holder of said surface rights or title; and likewise no holder or claimant of the surface rights shall be entitled to evidence or prove any use of the subsurface rights, by himself, or by his predecessors in title or of lessees or agents, as adverse possession against the holder of said subsurface rights, unless, in either case, at the time of beginning such allegedly adverse use and in each year of the same, said party or his predecessor in title so using shall have placed or caused to be placed upon the records of the register of deeds of the county wherein such property lies and in a book therein kept or provided for such purposes, a brief notice of intended use giving (i) the date of beginning or recommencing of the operation or use, (ii) a brief description of the property involved but sufficiently adequate to make said property readily locatable therefrom, (iii) the name and, if known, the address of the claimant of the right under which the operation or use is to be carried on or made and (iv) the deed or other instrument, if any, under which the right to conduct such operation or to make such use is claimed or to which it is to be attached. (C. C. P., s. 25; Code, s. 146; Rev., s. 386; C. S., s. 432; 1945, c. 869; 1959, c. 469; 1965, c. 1094.)

Editor's Note.—

The 1959 amendment added the proviso to the first paragraph.

The 1965 amendment inserted "together with the identification of the lands described therein" in the last sentence of the first paragraph.

For note on the relationship of this section to the acquisition of easements by prescription, see 32 N.C.L. Rev. 483 (1954).

For article concerning the quest for clear land titles in North Carolina, see 44 N.C.L. Rev. 89 (1965).

Construed with § 1-39.—

This section and § 1-39 are construed together. Barbee v. Edwards, 238 N. C. 215, 77 S. E. (2d) 646 (1953); Elliott v. Goss, 250 N. C. 185, 108 S. E. (2d) 475 (1959).

Section 1-39 and this section are to be construed together. When so construed, the rule is as follows: It is not necessary that a plaintiff in an action to recover land should allege in his complaint that he had possession within twenty years before action brought; for, if he establishes on the trial a legal title to the premises, he will be presumed to have been possessed thereof within the time required by law, unless it is made to appear that such premises have been hed and possessed adversely to

such legal title for the time prescribed by law before the commencement of such action. Williams v. North Carolina State Bd. of Educ., 266 N.C. 761, 147 S.E.2d 381 (1966).

Claim of Title under Paper Writing More Than Thirty Years Old.—This section does not declare that one who claims title relying merely on a paper writing more than thirty years old, thereby acquires title to the land described in the instrument nor does it establish title prima facie. Bowers v. Mitchell, 258 N. C. 80, 128 S. E. (2d) 6 (1962).

Quoted in DeBruhl v. L. Harvey & Son Co., 250 N. C. 161, 108 S. E. (2d) 469 (1959).

Cited in Walker v. Story, 253 N. C. 59, 116 S. E. (2d) 147 (1960).

§ 1-42.1. Certain ancient mineral claims extinguished.—(a) Where it appears on the public records that the fee simple title to any oil, gas or mineral interests in an area of land has been severed or separated from the surface fee simple ownership of such land and such interest is not in actual course of being mined, drilled, worked or operated, or in the adverse possession of another, or that the record title holder of any such oil, gas or mineral interests has not listed the same for ad valorem tax purposes in the county in which the same is located for a period of ten (10) years prior to January 1, 1965, any person, having the legal capacity to own land in this State, who has on September 1, 1965 an unbroken chain of title of record to such surface estate of such area of land for fifty (50) years or more, and provided such surface estate is not in the adverse possession of another, shall be deemed to have a marketable title to such surface estate as provided in the succeeding subsections of this section, subject to such interests and defects as are inherent in the provisions and limitations contained in the muniments of which such chain of record title is formed.

(b) Such marketable title shall be held by such person and shall be taken by his successors in interest free and clear of any and all such fee simple oil, gas or mineral interests in such area of land founded upon any reservation or exception contained in an instrument conveying the surface estate in fee simple which was executed or recorded fifty (50) years or more prior to September 1, 1965, and such oil, gas or mineral interests are hereby declared to be null and void and of no effect whatever at law or in equity: Provided, however, that any such fee simple oil, gas or mineral interest may be preserved and kept effective by recording within two (2) years after September 1, 1965, a notice in writing duly sworn to and subscribed before an official authorized to take probate by G.S. 47-1, which sets forth the nature of such oil, gas or mineral interest and gives the book and page where recorded. Such notice shall be probated as required for registration of instruments by G.S. 47-14 and recorded in the office of the register of deeds of the county wherein such area of land, or any part thereof lies, and in the book therein kept or provided under the terms of G.S. 1-42 for the purpose of recording certain severances of surface and subsurface land rights, and shall state the name and address of the claimant and, if known, the name of the surface owner and also contain either such a description of the area of land involved as to make said property readily located thereby or due incorporation by reference of the recorded instrument containing the reservation or exception of such oil, gas or mineral interest. Such notice may be made and recorded by the claimant or by any other person acting on behalf of any claimant who is either under a disability, unable to assert a claim on his own behalf, or one of a class but whose identity cannot be established or is uncertain at the time of filing such notice of claim for record.

(c) This section shall be construed to effect the legislative purpose of facilitating land title transactions by extinguishing certain ancient oil, gas or mineral claims unless preserved by recording as herein provided. The oil, gas or mineral claims hereby extinguished shall include those of persons whether within or without the State, and whether natural or corporate, but shall exclude governmental claims, State or federal, and all such claims by reason of unexpired oil, gas or mineral releases.

(d) All oil, gas or mineral interests in lands severed or separated from the surface fee simple ownership must be listed for ad valorem taxes and notice of such interest must be filed in writing in the manner provided by G.S. 1-42.1 (b) and recorded in the local registry in the book provided by G.S. 1-42 within two years from September 1, 1967, to be effective against the surface fee simple owner or creditors, purchasers, heirs or assigns of such owner. Subsurface oil, gas and mineral interests shall be assessed for ad valorem taxes as real property and such taxes shall be collected and foreclosed in the manner authorized by chapter 105 of the General Statutes of North Carolina. The board of county commissioners shall publish a notice of this subsection in a newspaper published in the county or having general circulation in the county once a week for four consecutive weeks prior to September 1, 1967.

The provisions of this subsection shall apply to the following counties: Anson, Buncombe, Durham, Franklin, Guilford, Hoke, Jackson, Montgomery, Person, Richmond, Swain, Transylvania, Union, Wake and Warren. (1965, c. 1072, s. 1; 1967, c. 905.)

Editor's Note.—Section 3 of the act inserting this section makes it effective Sept. 1, 1965.

The 1967 amendment added subsection (d).

§ 1-43. Tenant's possession is landlord's.

Quoted in Williams v. Robertson, 235 N. C. 478, 70 S. E. (2d) 692 (1952).

§ 1-44. No title by possession of right of way.

Applied in Withers v. Long Mfg. Co., 259 N. C. 139, 129 S. E. (2d) 886 (1963).

§ 1-44.1. **Presumption of abandonment of railroad right of way.**— Any railroad which has removed its tracks from a right of way and has not replaced them in whole or in part within a period of seven (7) years after such removal and which has not made any railroad use of any part of such right of way after such removal of tracks for a period of seven (7) years after such removal, shall be presumed to have abandoned the railroad right of way. (1955, c. 657.)

§ 1-45. No title by possession of public ways.

Adverse use of a part of a street dedicated to and accepted by the public cannot ripen title in the user when there has been an acceptance of the dedication of the street and no abandonment thereof on the part of the public. Salisbury v. Barnhardt, 249 N. C. 549, 107 S. E. (2d) 297 (1959)

Application of Section.—

Where there is a dedication and acceptance by the municipality or other governing body of public ways or squares and commons in this jurisdiction the statute of limitations does not now run against the municipality or governing body. Steadman v. Pinetops, 251 N. C. 509, 112 S. E. (2d) 102 (1960).

This section does not apply to streets, alleys and parks that have been offered for dedication if the offer has not been accepted, or if the offer has been accepted but the streets, alleys or parks have been abandoned. Lee v. Walker, 234 N. C. 687, 68 S. E. (2d) 664 (1952); Salisbury v. Barnhardt, 249 N. C. 549, 107 S. E. (2d) 297 (1959).

The rule that individuals may not acquire title to any part of a municipal street by encroaching upon or obstructing the same in any way does not apply when the evidence fails to show that the municipality had any title or rights therein. Hall v. Fayetteville, 248 N. C. 474, 103 S. E. (2d) 815 (1958).

ARTICLE 5.

Limitations, Other than Real Property.

§ 1-46. Periods prescribed.

Cited in Shearin v. Lloyd, 246 N. C. 363 98 S E. (2d) 508 (1957); Thurston Motor Lines, Inc. v. General Motors Corp., 258 N. C 323, 128 S. E. (2d) 413 (1962); Clardy v. Duke University, 299 F. (2d) 368 (1962).

§ 1-47. Ten years.—Within ten years an action—

(1) Upon a judgment or decree of any court of the United States, or of any state or territory thereof, from the date of its rendition. No such action may be brought more than once, or have the effect to continue the lien of the original judgment.

(1.1) Upon a judgment rendered by a justice of the peace, from its date.

(2) Upon a sealed instrument against the principal thereto.

(3) For the foreclosure of a mortgage, or deed in trust for creditors with a power of sale, of real property, where the mortgagor or grantor has been in possession of the property, within ten years after the forfeiture of the mortgage, or after the power of sale became absolute, or within ten years after the last payment on the same.

(4) For the redemption of a mortgage, where the mortgagee has been in possession, or for a residuary interest under a deed in trust for creditors, where the trustee or those holding under him has been in possession, within ten years after the right of action accrued.

(5): Repealed by Session Laws 1959, c. 879, s. 2.

(C. C. P., ss. 14, 31; Code, s. 152; Rev., s. 391; C. S., s. 437; 1937, c. 368; 1959, c. 879, s. 2; 1961, c. 115, s. 2.)

II-A. Subs. (1.1). Judgments Rendered by Justices.

I. IN GENERAL.

Editor's Note.—

The 1959 amendment repealed subdivision (5). Section 15 of the act provides that it "shall become effective July 1, 1960, and shall be applicable only to estates of persons dying on or after July 1, 1960."

The 1961 amendment, effective Oct. 1, 1961, inserted subdivision (1.1).

For comment on application of statute of limitations to promise of grantee assuming mortgage or deed of trust, see 43 N.C.L. Rev. 966 (1965).

Plea of Statute Places Burden on Plaintiff to Show Action Not Barred. — Upon defendant's plea of the statute of limitations the burden devolved upon plaintiffs to show that their action was not barred but was instituted within the time permitted by statute. Bennett v. Anson Bank & Trust Co., 265 N.C. 148, 143 S.E.2d 312 (1965).

Cited in First-Citizens Bank & Trust Co. v. Parker, 235 N. C. 326, 69 S. E. (2d) 841 (1952); State v. Bryant, 251 N. C. 423, 111 S. E. (2d) 591 (1959).

II. SUBS. (1). JUDGMENTS AND DECREES.

Section Does Not Apply to Award by Industrial Commission. — Conceding an award of compensation by the Industrial Commission has certain characteristics of a judgment, such award is not a judgment of a court within the meaning of subsection (1). Bryant v. Poole, 261 N.C. 553, 135 S.E.2d 629 (1964).

When Statute Begins to Run—Judgment in Favor of Infant.—The statute limiting the time to bring an action on a judgment to ten years from the date of its rendition does not begin to run as against an infant where the judgment was procured on his behalf by a next friend appointed for that purpose. Teele v. Kerr, 261 N.C. 148, 134 S.E.2d 126 (1964).

Section 1-17 permits the plaintiff to bring an action on a judgment secured by a next friend for an infant when the infant was nine years old within the time limited by subsection (1) of this section, i.e., ten years, after he became twenty-one years old. Teele v. Kerr, 261 N.C. 148, 134 S.E.2d 126 (1964).

Applied in Hanson v. Yandle, 235 N. C. 532, 70 S. E. (2d) 565 (1952).

Cited in Reid v. Bristol, 241 N. C. 699, 86 S. E. (2d) 417 (1955).

II-A. SUBS. (1.1). JUDGMENTS RENDERED BY JUSTICES.

Limitation Is Now Ten Years. — The period now prescribed for the commencement of an action on judgment rendered in a justice's court is ten years from its date. Bryant v. Poole, 261 N.C. 553, 135 S.E.2d 629 (1964).

III. SUBS. (2). SEALED INSTRUMENTS.

Section Applicable Only to Principals.— By its express terms, subsection (2) of this section is applicable only to principals. Pickett v. Rigsbee, 252 N. C. 200, 113 S. E. (2d) 323 (1960).

Notwithstanding Seal.—Affixing a seal to an instrument does not make this sec-

tion applicable. Pickett v. Rigsbee, 252 N. C. 200, 113 S. E. (2d) 323 (1960).

The statute of limitations barring actions against defendants as sureties is § 1-52, notwithstanding the seal appearing after their names. Pickett v. Rigsbee, 252 N. C. 200, 113 S. E. (2d) 323 (1960).

Original Agreement Executed on Independent Consideration.—Where the contract sued upon is an original agreement executed on an independent consideration and the defendant promisor is a principal, the ten year statute of limitations is controlling. New Amsterdam Cas. Co. v. Waller, 233 N. C. 536, 64 S. E. (2d) 826 (1951).

What Plaintiff Must Show.—The burden is upon plaintiffs to prove that the action accrued within the time limited by this section, by showing that the corporate defendant adopted the seal appearing on the contract for the special occasion or for all similar occasions, or that such seal became the seal of the corporation by reason of some other rule of law, or that the regular corporate seal was impressed or attached to the original of the contract, or that there are facts and circumstances which exclude the operation of the three-year statute, § 1-52, other than the matter of a seal. Security Nat'l Bank v. Educators Mut. Life Ins. Co., 265 N.C. 86, 143 S.E.2d 270 (1965).

V. SUBS. (4). REDEMPTION OF MORTGAGE.

Mortgagor's Widow's Right to Dower Not Affected.—The mortgagor loses his right to redeem the premises in question prior to his death by permitting the mortgagee to remain in possession for more than ten years after his right to redeem has accrued, provided the provisions of this section are pleaded in bar thereof, but the loss of the mortgagor's right to redeem does not affect his widow's right to dower in the equity of redemption. Gay v. J. Exum & Co., 234 N. C. 378, 67 S. E. (2d) 290 (1951), commented on in 30 N. C. Law Rev. 310.

Applied in Barbee v. Edwards, 238 N. C. 215, 77 S. E. 646 (1953); Jordan v. Chappel, 246 N. C. 620, 99 S. E. (2d) 778 (1957).

§ 1-49. Seven years.

1: Repealed by Session Laws 1961, c. 115, s. 1.

Cross References.

As to present limitations of an action on a judgment by a justice of the peace, see § 1-47.

Editor's Note. — The 1961 amendment, effective Oct. 1, 1961, repealed subsection 1.

Cited in Reid v. Bristol, 241 N. C. 699, 86 S. E. (2d) 417 (1955).

§ 1-50. Six years.—Within six years an action—

(1) Upon the official bond of a public officer.

(2) Against an executor, administrator, collector, or guardian on his official bond, within six years after the auditing of his final account by the proper officer, and the filing of the audited account as required by law.

(3) For injury to any incorporeal hereditament.

(4) Against a corporation, or the holder of a certificate or duplicate certificate of stock in the corporation, on account of any dividend, either a cash or stock dividend, paid or allotted by the corporation to the holder of the certificate or duplicate certificate of stock in the corporation.

(5) No action to recover damages for any injury to property, real or personal, or for an injury to the person, or for bodily injury or wrongful death, arising out of the defective and unsafe condition of an improvement to real property, nor any action for contribution or indemnity for damages sustained on account of such injury, shall be brought against any person performing or furnishing the design, planning, supervision of construction or construction of such improvement to real property, more than six (6) years after the performance or furnishing of such services and construction. This limitation shall not apply to any person in actual possession and control as owner, tenant or otherwise, of the improvement at the time the

defective and unsafe condition of such improvement constitutes the proximate cause of the injury for which it is proposed to bring an action. (C. C. P., s. 33; Code, s. 154; Rev., s. 393; C. S., s. 439; 1931, c. 169; 1963, c. 1030.)

I. IN GENERAL.

Editor's Note.—

The 1963 amendment added subdivision (5).

Plea of Statute Places Burden on Plaintiff to Show Action Not Barred. — Upon defendant's plea of the statute of limitations the burden devolved upon plaintiffs to show that their action was not barred but was instituted within the time permitted by statute. Bennett v. Anson Bank & Trust Co., 265 N.C. 148, 143 S.E.2d 312 (1965).

Cited in J. G. Dudley Co. v. Commissioner of Internal Revenue, 298 F. (2d) 750 (1962); Jewell v. Price, 264 N.C. 459, 142 S.E.2d 1 (1965).

§ 1-52. Three years.

XI. Subsection Eleven—Fair Labor Standards Act.

I. IN GENERAL.

Editor's Note.—

For comment on limitations as to claims between spouses, see 44 N.C.L. Rev. 197 (1965).

Burden of Proving Section.—

In accord with original. See Swartzberg v. Reserve Life Ins. Co., 252 N. C. 150, 113 S. E. (2d) 270 (1960).

While the plea of the statute of limitations is a positive defense and must be pleaded, even so, when it has been properly pleaded, the burden of proof is then upon the party against whom the statute is pleaded to show that his claim is not barred, and is not upon the party pleading the statute to show that it is barred. Solon Lodge v. Ionic Lodge, 247 N. C. 310, 101 S. E. (2d) 8 (1957).

Upon defendant's plea of the statute of limitations the burden devolved upon plaintiffs to show that their action was not barred but was instituted within the time permitted by statute. Bennett v. Anson Bank & Trust Co., 265 N.C. 148, 143 S.E.2d 312 (1965).

Failure to Sustain Burden. — Where a party against whom the statute has been pleaded fails to sustain the burden on him to show that limitations had not run against his cause of action, it is proper for the court to grant a motion for nonsuit. Fulp v. Fulp, 264 N.C. 20, 140 S.E.2d 708 (1965).

Classification Is Based upon Nature of Right, Rather than Remedy.—There is no suggestion of classification in the limitations statutes on the basis of remedies which might be available for enforcement of the substantive right The right asserted is determinative, not the relief sought. New Amsterdam Cas. Co. v. Waller, 301 F. (2d) 839 (1962).

The classification in the limitations statutes is based upon the substantive nature of the cause of action. New Amsterdam Cas. Co. v. Waller, 301 F. (2d) 839 (1962).

For purposes of limitations the North Carolina court has looked to the nature of the right of the litigant which calls for judicial aid, not to the nature of the remedy to rectify the wrong. New Amsterdam Cas. Co. v. Waller, 301 F. (2d) 839 (1962).

The period prescribed for the commencement of an action, whether considered an action for breach of warranty or an action for negligence, is three years from the time the cause of action accrued. Thurston Motor Lines, Inc. v. General Motors Corp., 258 N. C. 323, 128 S. E. (2d) 413 (1962).

When the statute begins to run, it continues until stopped by appropriate judicial process. B-W Acceptance Corp. v. Spencer, 268 N.C. 1, 149 S.E.2d 570 (1966).

Section Applies Though Enforcing Remedy Is Equitable Lien.—The ten-year statute applies when the title to property is at issue, not where the action is merely for breach of contract, though the enforcing remedy, the equitable lien, is analogous to remedies for resort to which the statute of limitations is ten years. Fulp v. Fulp, 264 N.C. 20, 140 S.E.2d 708 (1965).

Effect of Equity upon Claim.—

The lapse of time, when properly pleaded, is a technical legal defense. Nevertheless, equity will deny the right to assert that defense when delay has been induced by acts, representations, or conduct, the repudiation of which would amount to a breach of good faith. Nowell v. Great Atlantic & Pacific Tea Co., 250 N. C. 575, 108 S. E. (2d) 889 (1959).

The defense of the statute is not barred by the existence of a fiduciary relation between the parties. Fulp v. Fulp, 264 N.C. 20, 140 S.E.2d 708 (1965).

Statute Runs between Spouses.—Stat-

utes of limitation run as well between spouses as between strangers. Fulp v. Fulp, 264 N.C. 20, 140 S.E.2d 708 (1965).

Effect of Disability.—

A cause of action accrues to an injured party, so as to start the running of the statute of limitations, when he is at liberty to sue, being at the time under no disability. B-W Acceptance Corp. v. Spencer, 268 N.C. 1, 149 S.E.2d 570 (1966).

Disability of Infants.—The rule, except in suits for realty where the legal title is in the ward, is that the statute of imitations runs against an infant as to all rights of action which the guardian might bring and which it was incumbent on him to bring, in so far as may be consistent with the limitations of his office. Rowland v. Beauchamp, 253 N. C. 231, 116 S. E. (2d) 720 (1960).

Part Payment by Joint Debtor.—

In accord with original. See Pickett v. Rigsbee, 252 N. C. 200, 113 S. E. (2d) 323 (1960). But see Editor's Note under § 1-27.

Question of Law and Fact. — While, ordinarily, the bar of the statute of limitations is a mixed question of law and fact, nevertheless, where the party against whom the statute has been pleaded fails to sustain the burden on him to show that limitations had not run against his cause of action, it is proper for the court to grant a motion for nonsuit. Solon Lodge v. Ionic Lodge, 247 N. C. 310, 101 S. E. (2d) 8 (1957).

But where the facts are in doubt or in dispute and there is any evidence sufficient to justify the inference that the cause of action is not barred, the trial court may not withdraw the case from the jury. Solon Lodge v. Ionic Lodge, 247 N. C. 310, 101 S. E. (2d) 8 (1957).

Subsection Five—Injury to Person or Rights of Another.—

Subsection five applies to a cause of action to recover for personal injuries negligently inflicted. Stamey v. Rutherfordton Electric Membership Corp., 249 N. C. 90, 105 S. E. (2d) 282 (1958).

An action for malicious prosecution or abuse of process was not barred by this section, where the action was begun two years, eleven months and twenty-one days after the plaintiff was discharged from the State hospital. Barnette v. Woody, 242 N. C. 424, 88 S. E. (2d) 223 (1955).

Action for Malpractice. — The period prescribed for the commencement of an action for malpractice based on negligence is three years from the time the cause of action accrues. Shearin v. Lloyd, 246 N. C. 363, 98 S. E. (2d) 508 (1957).

In actions involving the alleged tortious conduct of physicians and surgeons, the cause of action arises when the alleged wrongful act is committed. Clardy v. Duke University, 299 F. (2d) 368 (1962).

Applied in Lewis v. Shaver, 236 N. C. 510, 73 S. E. (2d) 320 (1952); Merchants & Planters Nat. Bank v. Appleyard, 238 N. C. 145, 77 S. E. (2d) 783 (1953); as to subsection 5, in Crowell v. Eastern Air Lines, 240 N. C. 20, 81 S. E. (2d) 178 (1954); Graham v. Taylor Biscuit Co., 161 F. Supp. 435 (1957); Nowell v. Neal, 249 N. C. 516, 107 S. E. (2d) 107 (1959); Horne v. Cloninger, 256 N. C. 102, 123 S. E. (2d) 112 (1961); Snyder v. Wylie, 239 F. Supp. 999 (W.D.N.C. 1965); Sharpe v. Pugh, 270 N.C. 598, 155 S.E.2d 108 (1967).

Stated in Chas. R. Shepherd, Inc. v. Clement Bros. Co., 177 F. Supp. 288 (1959).

Cited in United States v. Lance, Inc., 95 F. Supp. 327 (1951); Quevedo v. Deans, 234 N. C. 618, 68 S. E. (2d) 275 (1951); Wilson v. Chandler, 235 N. C. 373, 70 S. E. (2d) 179 (1952); Reid v. Holden, 242 N. C. 408, 88 S. E. (2d) 125 (1955); Reuning v. Henkel, 138 F. Supp. 492 (1956); Piedmont Natural Gas Co. v. Day, 249 N. C. 482, 106 S. E. (2d) 678 (1959); Edwards v. Arnold, 250 N. C. 500, 109 S. E. (2d) 205 (1959); Styers v. Gastonia, 252 N. C. 572, 114 S. E. (2d) 348 (1960); J. G. Dudley Co. v. Commissioner of Internal Revenue, 298 F. (2d) 750 (1962); Security Nat'l Bank v. Educators Mut. Life Ins. Co., 265 N.C. 86, 143 S.E.2d 270 (1965).

II. SUBSECTION ONE—CONTRACTS.

The statute begins to run on the date the promise is broken. Pickett v. Rigsbee, 252 N. C. 200, 113 S. E. (2d) 323 (1960).

But a new promise to pay fixes a new date from which the statute runs. Such promise, to be binding, must be in writing as required by § 1-26. Pickett v. Rigsbee, 252 N. C. 200, 113 S. E. (2d) 323 (1960).

Effect of Exercise of Acceleration Clause in Note.—Where the holder of a note exercises the acceleration clause therein contained by instituting an action against two of the comakers on the note for the entire indebtedness after default in the payment of an installment, the exercise of the acceleration clause is effective as to a third comaker, even though he is not made a party to the action, and action on the note against the third comaker

is barred after the elapse of more than three years from the exercise of the acceleration clause, the note not being under seal. Shoenterprise Corp. v. Willingham, 258 N. C. 36, 127 S. E. (2d) 767 (1962).

Indemnity Bond.—When the promisor in an indemnity bond has a personal, immediate, and pecuniary interest in the transaction in which the third party is the original obligor, the courts will always give effect to the promise as an original and direct promise to pay, and this section is not applicable. New Amsterdam Cas. Co. v. Waller, 233 N. C. 536, 64 S. E. (2d) 826 (1951).

Action Based on Implied Contract.—An action based on an implied contract is analogous to one based on the breach of an express trust, which is necessarily based on a breach of contract, and the limitation applicable to both such actions is three years. Fulp v. Fulp, 264 N.C. 20, 140 S.E.2d 708 (1965).

Breach of Express Trust.—

Where a trust is based on an agreement or transaction operating as an express trust, the limitation applicable is the statute of three years set out in this section Solon Lodge v. Ionic Lodge, 247 N. C. 310, 101 S. E. (2d) 8 (1957).

Same—When Statute Begins to Run.—The general rule is that a trustee's repudiation of a trust and his assertion of an adverse claim of ownership is not sufficient to start the statute of limitations to running, unless and until such repudiation and claim are made known to the beneficiary of the trust so as to require him to assert his rights. Solon Lodge v. Ionic Lodge, 247 N. C. 310, 101 S. E. (2d) 8 (1957).

Where it appears that the relation of landlord and tenant has been established between trustee and cestui que trust, evidenced by voluntary payment of rent by the cestui que trust to the trustee, such relation ordinarily suffices to set the statute of limitations to running against the cestui que trust. But where, as in the instant case, the object of the trust is to hold and preserve title for the benefit of an unincorporated association, whose personnel is constantly in flux and subject to future change, the mere establishment of the relation of landlord and tenant and the collection of rent by the trustee, without more, is not enough to start the statute to running. To set the statute in motion it would be necessary to show that all the members of the unincorporated association had knowledge, or in law were charged with knowledge, that the trustee was exacting and the association officers were paying rent. Solon Lodge v. Ionic Lodge, 247 N. C. 310, 101 S. E. (2d) 8 (1957).

In the case of an express trust, the statute begins to run when the trustee disavows the trust with the knowledge of the cestui que trust. Fulp v. Fulp, 264 N.C. 20, 140 S.E.2d 708 (1965).

Effect of Insurance Policy Provision That Action Be Commenced within Specified Time. — Where an agreement contained a contract insuring a carrier from loss by fire and theft, etc., and also a contract of suretyship in regard to claims of third persons under § 62-111, the court held that provisions of the insurance contract that action be commenced within a specified time are not applicable to claims under the surety contract, and the surety's right of action for reimbursement of claims of third persons paid by it does not arise until such payment, and action brought within three years of such payment is not barred either under the contract or by the three-year statute of limitations. American Nat'l Fire Ins. Co. v. Gibbs, 260 N.C. 681, 133 S.E.2d 669 (1963).

When compensation is to be provided in the will of the recipient, the cause of action accrues when he dies without having made the agreed testamentary provision. Johnson v. Sanders, 260 N.C. 291, 132 S.E.2d 582 (1963).

Claims for Services.—

When personal services are rendered with the understanding that compensation is to be made in the will of the recipient, payment therefor does not become due until death, and the statutes of limitations do not begin to run until that time. Stewart v. Wyrick, 228 N. C. 429, 45 S. E. (2d) 764 (1947); Speights v. Carraway, 247 N. C. 220, 100 S. E. (2d) 339 (1957).

A cause of action to recover for personal services rendered and funds advanced for the care of intestate in reliance upon intestate's promise to pay for same by willing property to plaintiff does not accrue until the death of intestate without having willed property to plaintiff, and this section can have no application when the action is commenced within three years of intestate's death. Speights v. Carraway, 247 N. C. 220, 100 S. E. (2d) 339 (1957).

This section bars a claim for personal services rendered a decedent only as to those services rendered more than three years prior to the date of decedent's death, and in view of § 1-22, the contention that this section bars the claim for all services rendered more than three years prior to

the institution of the action is untenable. Hodge v. Perry, 255 N. C. 695, 122 S. E. (2d) 677 (1961).

Services rendered more than three years prior to the death of the recipient are barred by the statute of limitations in the absence of a contract to pay by testamentary provision. Johnson v. Sanders, 260 N.C. 291, 132 S.E.2d 582 (1963).

Daughter's failure to establish an express contract to pay by testamentary provision for her services to her father will not defeat her right to prosecute her claim for services rendered during the three years preceding her father's death. Johnson v. Sanders, 260 N.C. 291, 132 S.E.2d 582 (1963).

The right of action by one partner to compel an accounting by the other did not arise and the statute of limitations did not begin to run until the demanding partner had notice of the other partner's termination of the partnership and refusal to account. Prentzas v. Prentzas, 260 N. C. 101, 131 S. E. (2d) 678 (1963).

As between partners themselves the statute would not begin to run on the cause of action for an accounting until one partner had notice of the other's termination of the partnership and his refusal to account. This is but an application of the rule that the statute of limitations does not commence to run against a trustee until he repudiates his trust. Bennett v. Anson Bank & Trust Co., 265 N.C. 148, 143 S.E.2d 312 (1965).

Sale of House with Defective Furnace.— Defendant's negligent breach of the legal duty arising out of his contractual relation with plaintiffs occurred when he delivered to them a house with a furnace lacking a draft regulator and, also, having been installed too close to combustible joists. Jewell v. Price, 264 N.C. 459, 142 S.E.2d 1 (1965).

In an action to recover payments made under a contract to sell realty, no question of the statute of limitations arises where the provisions of this section were not pleaded. Brannock v. Fletcher, 271 N.C. 65, 155 S.E.2d 532 (1967).

An action ex contractu brought by a municipal corporation to recover the cost of rebuilding a bridge, upon a breach by defendant of his contract with plaintiff to replace it, is an action to enforce private, corporate, or proprietary rights of the municipal corporation, and as such the three-year statute of limitations may be interposed as a defense by defendant. City of Reidsville v. Burton, 269 N.C. 206, 152 S.E.2d 147 (1967).

Applied in Nowell v. Neal, 249 N. C. 516, 107 S. E. (2d) 107 (1959); Nowell v. Great Atlantic & Pacific Tea Co., 250 N. C. 575, 108 S. E. (2d) 889 (1959); Matthieu v. Piedmont Natural Gas Co., 269 N.C. 212, 152 S.E.2d 336 (1967).

III. SUBSECTION TWO—LIABILITY CREATED BY STATUTE.

Actions under Antitrust Laws. — It is not clear whether § 1-54(2) or § 1-52(2) governs actions under the antitrust laws. It is clear, however, that in such cases, the sources of damage are separable for purposes of limitations. Miller Motors, Inc. v. Ford Motor Co., 149 F. Supp. 790 (1957).

Section Applicable to Private Action for Treble Damages under Antitrust Laws.— A private action for treble damages under the antitrust laws is not an action to recover a penalty or forfeiture, but rather is an action upon a liability created by statute and is in the nature of an action of tort. It is remedial and compensatory. Therefore this section is the applicable statute of limitations under which the plaintiff's cause of action lies. Thompson v. North Carolina Theatres, Inc., 176 F. Supp. 73 (1959).

Stated in North Carolina Theatres, Inc. v. Thompson, 277 F. (2d) 673 (1960).

Cited in Miller Motors, Inc. v. Ford Motor Co., 252 F. (2d) 441 (1958).

IV. SUBSECTION THREE—TRESPASS UPON REALTY.

Plea of Statute as Plea in Bar to Preclude Reference. — See note to § 1-189, analysis line II.

Allegations Properly Stricken Where No Damages for Trespass Claimed. — In an action to remove cloud on title in which defendants claim title by adverse possession, allegations in the answer pleading that plaintiffs' cause of action for trespass accrued more than three years prior to the commencement of the action are properly stricken as irrelevant, there being no claim of damages for trespass. Williams v. North Carolina State Bd. of Educ., 266 N.C. 761, 147 S.E.2d 381 (1966).

Action for Recurrent Trespass Not Barred by Statute of Limitations.—Plaintiff instituted this action to recover damages to his land caused by the seeping of gasoline from defendant's underground storage tank. Defendant pleaded the statute of limitations because the action was not instituted within three years from the first injury alleged. By reply, plaintiff alleged that on three separate occasions defendant dug up and reinstalled the tank to

stop the leakage, the last of which was within three years of the institution of the action. It was held that, construing the reply liberally, it was sufficient to allege recurring acts of negligence or wrongful conduct, each causing a renewed injury to plaintiff's property, and therefore demurrer to the reply should have been overruled. Oakley v. Texas Co., 236 N. C. 751, 73 S. E. (2d) 898 (1953).

Cited in Lyda v. Marion, 239 N. C. 265, 79 S. E. (2d) 726 (1954).

VI. SUBSECTION SIX—SURETIES OF EXECUTORS, ETC.

Effect of Seal.—This section creates the statute of limitations for sureties, notwithstanding the fact that a seal may appear after their names. Pickett v. Rigsbee, 252 N. C. 200, 113 S. E. (2d) 323 (1960).

IX. SUBSECTION NINE—FRAUD OR MISTAKE.

Editor's Note.—For comment on running of limitations against equitable claims, see 44 N.C.L. Rev. 202 (1965).

Scope of Words "Relief on the Ground of Fraud". — In the construction of this section, the words "relief on the ground of fraud" are used in the broad sense to apply to all actions, both legal and equitable, where fraud is an element, and to all forms of fraud, including deception, imposition, duress, and undue influence. Swartzberg v. Reserve Life Ins. Co., 252 N. C. 150, 113 S. E. (2d) 270 (1960).

Declaration of Constructive Trust.—The period of limitations for actions in which the relief asked is the declaration of a constructive trust is determined by reference to the nature of the substantive right asserted. New Amsterdam Cas. Co. v. Waller, 301 F. (2d) 839 (1962).

A declaration that one is a constructive trustee is an appropriate remedial step, but it is not descriptive of the substantive right, and the fact that the plaintiff seeks it is irrelevant to the question of limitations. New Amsterdam Cas. Co. v. Waller, 301 F. (2d) 839 (1962).

When Statute Begins to Run.—

In accord with 2nd paragraph in original. See Brooks v. Ervin Constr. Co., 253 N. C. 214, 116 S. E. (2d) 454 (1960); B-W Acceptance Corp. v. Spencer, 268 N.C. 1, 149 S.E.2d 570 (1966).

The action shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud. B-W Acceptance Corp. v. Spencer, 268 N.C. 1, 149 S.E.2d 570 (1966).

In order to exercise their right to an accounting twenty-six years after it accrued, plaintiffs must establish that they exercised it within three years of the time they discovered or ought by reasonable diligence under the circumstances to have discovered the fraud. Bennett v. Anson Bank & Trust Co., 265 N.C. 148, 143 S.E.2d 312 (1965).

It is generally held that where there is concealment of fraud or continuing fraud, the statute of limitations does not bar a suit for relief on account of it, and thereby permit the statute which was designed to prevent fraud to become an instrument to perpetrate and perpetuate it. Bennett v. Anson Bank & Trust Co., 265 N.C. 148, 143 S.E.2d 312 (1965).

A failure to use such diligence as is ordinarily required of two persons transacting business with each other may be excused when there exists such a relation of trust and confidence between the parties that it is the duty, on the part of the one who committed the fraud and thereby induced the other to refrain from inquiry, to disclose to the other the truth. Bennett v. Anson Bank & Trust Co., 265 N.C. 148, 143 S.E.2d 312 (1965).

Bar of Statute May Be Raised Only by Answer. — Subsection (9) of this section is not annexed to the cause of action in a case of fraudulent substitution of names in a deed which is then registered. The bar thereof may only be raised by answer. Elliott v. Goss, 250 N. C. 185, 108 S. E. (2d) 475 (1959).

Same—Record as Notice of Fraud.—

A cause of action for fraud does not accrue and the statute of limitations, subsection (9) of this section, does not begin to run until the facts constituting the fraud are known or should have been discovered in the exercise of due diligence, and the mere registration of a deed, standing alone, will not be imputed for constructive notice. Elliott v. Goss, 250 N. C. 185, 108 S. E. (2d) 475 (1959).

Cause of Action to Set Aside Deed for Fraud and Undue Influence.—Where it is established that the person under whom plaintiffs claim was mentally competent and had knowledge for more than three years prior to her death of the facts constituting the basis of the cause of action to set aside a deed to property for fraud and undue influence, plaintiffs' claim is barred. Muse v. Muse, 236 N. C. 182, 72 S. E. (2d) 431 (1952).

A resulting or constructive trust, as distinguished from an express trust, is governed by the ten-year and not the three-year statute of limitations. Bowen v. Darden, 241 N. C. 11, 84 S. E. (2d) 289 (1954).

Rescission of Insurance Policy. — Whether considered fraud "in the broad sense," or "mistake," subsection (9) of this section is applicable to an action to rescind an insurance policy on the ground of false material statements in the application therefor. Swartzberg v. Reserve Life Ins. Co., 252 N. C. 150, 113 S. E. (2d) 270 (1960).

Amendment of Complaint. — Where it appeared from plaintiff's own pleadings and admissions that plaintiff discovered and had knowledge of the alleged fraud more than three years prior to the filing of an amendment to her complaint, which for the first time alleged the cause of action for fraud, the action was barred by subsection (9) of this section. Nowell v. Hamilton, 249 N. C. 523, 107 S. E. (2d) 112 (1959).

Burden of Proof.—

In accord with 1st paragraph in original. See Willetts v. Willetts, 254 N. C. 136, 118 S. E. (2d) 548 (1961).

Evidence Sufficient to Show Action Commenced within Statutory Time.—In an action to recover damages for fraudulent representations as to the amount of land included in a lot purchased by plaintiffs, plaintiffs' testimony was sufficient to show that the action was begun within three years from the time the facts constituting the alleged fraud were discovered, or should have been discovered by them in the exercise of reasonable diligence. Swinton v. Savoy Realty Co., 236 N. C. 723, 73 S. E. (2d) 785 (1953).

Cross Action Filed More than Three Years from Discovery of Fraud Properly Dismissed. — Where defendant in his answer alleges that he refused to comply with his contract on the contractual date because of his discovery of fraudulent misrepresentations inducing his execution of the contract, and files a cross action against plaintiff and his codefendants for such fraud more than three years after the contractual date, judgment dismissing the cross action on motion upon the plea of the three year statute of limitations is without error. Speas v. Ford, 253 N. C. 770, 117 S. E. (2d) 784 (1961).

Applied in Sandlin v. Weaver, 240 N. C. 703, 83 S. E. (2d) 806 (1954).

XI. SUBSECTION ELEVEN—FAIR LABOR STANDARDS ACT.

Purpose.—Subsection (11) of this section was passed in order to enlarge the period of limitations for the recovery of penalties under the Fair Labor Standards Act, which would otherwise have been limited to the period of one year under subdivision (2) of § 1-54. North Carolina Theatres, Inc. v. Thompson, 277 F. (2d) 673 (1960).

§ 1-53. Two years.

Cross References.

See note to § 28-173.

I. SUBSECTION ONE—POLITICAL SUBDIVISIONS OF STATE.

Actions for Damages Based on Torts. —The words "claims," "maturity" and "holders," appearing in the first clause of subsection (1), as well as the further provisions thereof, and the history of the statute, impel the conclusion that this subsection does not apply to actions for damages based on torts. Dennis v. Albemarle, 242 N. C. 263, 87 S. E. (2d) 561 (1955).

This section and § 153-64 do not require the filing of a claim with a city before suit may be brought for damages for a tort committed by the city in a proprietary activity. Bowling v. City of Oxford, 267 N.C. 552, 148 S.E.2d 624 (1966).

Applied in Broadfoot v. Everett, 270 N.C. 429, 154 S.E.2d 522 (1967).

Cited in Styers v. Gastonia, 252 N. C. 572, 114 S. E. (2d) 348 (1960); Byrd v. Pawlick, 362 F.2d 390 (4th Cir. 1966).

II. SUBSECTION TWO—PENALTY FOR USURY.

Applied in Preyer v. Parker, 257 N. C. 440, 125 S. E. (2d) 916 (1962).

IV. SUBSECTION FOUR — DEATH BY WRONGFUL ACT.

Editor's Note.—

This section and § 28-173 were amended in 1951 so as to remove from the latter section the provision previously contained therein fixing the period of time in which an action for damages for wrongful death must be instituted and so as to make such action subject to the two-year statute of limitations set forth in this section. The effect of the amendment was to make the time limitation a statute of limitations and no longer a condition precedent to the right to bring and maintain the action. Kinlaw v. Norfolk So. Ry., 269 N.C. 110, 152 S.E.2d 329 (1967).

Effect of 1951 Amendments to This Section and § 28-173.—Up to the time of the amendments of 1951 to § 28-173 and this section it had consistently been held that the time limitation in § 28-173 was not a

statute of limitations, but rather a condition precedent to maintenance of an action. The effect of the amendments was to remove the time limitation from the Wrongful Death Act and make the act subject to the statute of limitations of two years. McCrater v. Stone & Webster Engineering Corp., 248 N. C. 707, 104 S. E. (2d) 858 (1958).

Prior to the enactment of subsection (4) of this section, which amended § 28-173, the institution of an action for wrongful death within one year after such death was a condition precedent to maintaining the action. All other requirements of the section were also strictly construed. The amendment removed the time limitation as a condition annexed to the cause of action and made it a two-year statute of limitation. Graves v. Welborn, 260 N.C. 688, 133 S.E.2d 761 (1963).

Amendment of Complaint. — In an action for wrongful death, where the original complaint fails to state facts sufficient to constitute a cause of action, an amendment supplying the deficiency does not relate back to the commencement of the action but constitutes a new cause of action for the purpose of computing the bar of the statute of limitations. In each such instance the ultimate determinative question is whether the amendment states a new cause of action. Stamey v. Rutherfordton Electric Membership Corp., 249 N. C. 90, 105 S. E. (2d) 282 (1958).

Applied in Hall v. Carroll, 253 N. C. 220, 116 S. E. (2d) 459 (1960); Hardbarger v Deal, 258 N. C. 31, 127 S. E. (2d) 771 (1962).

§ **1-54. One year.**—Within one year an action or proceeding—

(1) Against a public officer, for a trespass under color of his office.

(2) Upon a statute, for a penalty or forfeiture, where the action is given to the State alone, or in whole or in part to the party aggrieved, or to a common informer, except where the statute imposing it prescribes a different limitation.

(3) For libel, assault, battery, or false imprisonment.

(4) Against a public officer, for the escape of a prisoner arrested or imprisoned on civil process.

(5) For the year's allowance of a surviving spouse or children.

(6) For a deficiency judgment on any debt, promissory note, bond or other evidence of indebtedness after the foreclosure of a mortgage or deed of trust on real estate securing such debt, promissory note, bond or other evidence of indebtedness, which period of limitation above prescribed commences with the date of the delivery of the deed pursuant to the foreclosure sale: Provided, however, that if an action on the debt, note, bond or other evidence of indebtedness secured would be earlier barred by the expiration of the remainder of any other period of limitation prescribed by this subchapter, that limitation shall govern. (C. C. P., s. 35; Code, s. 156; 1885, c. 96; Rev., s. 397; C. S., s. 443; 1933, c. 529, s. 1; 1951, c. 837, s. 2; 1965, c. 9.)

Editor's Note.—

Prior to the 1965 amendment, subdivision (5) read "For a widow's year's allowance."

This section does not apply to causes of action for (1) tortious injury and damage to the automobile, and (2) for wrongful seizure and conversion of the tires. Reid v. Holden, 242 N. C. 408, 88 S. E. (2d) 125 (1955).

Actions under Antitrust Laws. — It is not clear whether § 1-54 (2) or § 1-52 (2) governs actions under the antitrust laws. It is clear, however, that in such cases, the sources of damage are separable for purposes of limitations. Miller Motors, Inc. v. Ford Motor Co., 149 F. Supp. 790 (1957).

Subsection (2) of this section is not applicable in a right of action arising out of the federal antitrust statutes. Thompson v. North Carolina Theatres, Inc., 176 F. Supp. 73 (1959).

Same — Action for False Imprisonment.—

A cause of action for false imprisonment is barred by this section after the expiration of one year from plaintiff's release from custody by the giving of bond, notwithstanding that the criminal prosecution in which the arrest took place continues within the limitation period. Mobley v. Broome, 248 N. C. 54, 102 S. E. (2d) 407 (1958).

Applied in Lewis v. Shaver, 236 N. C.

510, 73 S. E. (2d) 320 (1952); as to subsection 3, Moser v. Fulk, 237 N. C. 302, 74 S. E. (2d) 729 (1953); Reid v. Holden, 242 N. C. 408, 88 S. E. (2d) 125 (1955); Barnette v. Woody, 242 N. C. 424, 88 S. E. (2d) 223 (1955); Nowell v. Neal, 249 N. C. 516, 107 S. E. (2d) 107 (1959).

Stated in North Carolina Theatres, Inc. v. Thompson, 277 F. (2d) 673 (1960).

Cited in United States v. Lance, Inc., 95 F. Supp. 327 (1951); Miller Motors, Inc. v. Ford Motor Co., 252 F. (2d) 441 (1958); Johnson v. Graye, 251 N. C. 448, 111 S. E. (2d) 595 (1959); Waldron Buick Co. v. General Motors Corp., 254 N. C. 117, 118 S. E. (2d) 559 (1961); Jocie Motor Lines, Inc. v. International Bhd. of Teamsters, 260 N.C. 315, 132 S.E.2d 697 (1963); Little v. Stevens, 267 N.C. 328, 148 S.E.2d 201 (1966).

§ 1-55. Six months.

Cited in Johnson v. Graye, 251 N. C. 448, 111 S. E. (2d) 595 (1959).

ARTICLE 5A.

Limitations, Actions Not Otherwise Limited.

§ 1-56. All other actions, ten years.

I. IN GENERAL.

Statute Runs between Spouses.—Statutes of limitation run as well between spouses as between strangers. Fulp v. Fulp, 264 N.C. 20, 140 S.E.2d 708 (1965).

When Nonsuit Proper.—Where a party against whom the statute has been pleaded fails to sustain the burden on him to show that limitations had not run against his cause of action, it is proper for the court to grant a motion for nonsuit. Fulp v. Fulp, 264 N.C. 20, 140 S.E.2d 708 (1965).

Applied in Sandlin v. Weaver, 240 N. C. 703, 83 S. E. (2d) 806 (1954); Barbee v. Edwards, 238 N. C. 215, 77 S. E. (2d) 646 (1953); Solon Lodge v. Ionic Lodge, 247 N. C. 310, 101 S. E. (2d) 8 (1957).

Cited in Quevedo v. Deans, 234 N. C. 618, 68 S. E. (2d) 275 (1951).

II. ACTIONS TO WHICH APPLICABLE.

The ten-year statute applies when the title to property is at issue, not where the action is merely for breach of contract, though the enforcing remedy, the equitable lien, is analogous to remedies for resort to which the statute of limitations is ten years. Fulp v. Fulp, 264 N.C. 20, 140 S.E.2d 708 (1965).

In an action to remove cloud on title in which defendants claim title by adverse possession, allegations in the answer pleading this section upon the assertion that plaintiffs' action accrued more than ten years prior to the commencement of the action are properly stricken as irrelevant. Williams v. North Carolina State Bd. of Educ., 266 N.C. 761, 147 S.E.2d 381 (1966).

Where an action is for breach of contract and not one to establish a constructive or resulting trust, the action is barred after three years from defendant's categorical denial of plaintiff's rights. Parsons v. Gunter, 266 N.C. 731, 147 S.E.2d 162 (1966).

A resulting or constructive trust, as distinguished from an express trust, is governed by the ten-year and not the three-year statute of limitations. Bowen v. Darden, 241 N. C. 11, 84 S. E. (2d) 289 (1954).

The period of limitations for actions in which the relief asked is the declaration of a constructive trust is determined by reference to the nature of the substantive right asserted. New Amsterdam Cas. Co. v. Waller, 301 F. (2d) 839 (1962).

The institution of an action to enforce a resulting trust is governed by the ten-year statute. New Amsterdam Cas. Co. v. Waller, 301 F. (2d) 839 (1962).

Were plaintiff the cestui que trust of a resulting or a constructive trust, the ten-year statute would apply. Fulp v. Fulp, 264 N.C. 20, 140 S.E.2d 708 (1965).

Claim for Services Where Compensation Was to Be Made by Will. — When personal services are rendered with the understanding that compensation is to be made in the will of the recipient, payment therefor does not become due until death, and the statutes of limitations do not begin to run until that time. Stewart v. Wyrick, 228 N. C. 429, 45 S. E. (2d) 764 (1947).

SUBCHAPTER III. PARTIES.

Article 6.

Parties.

§ 1-57. Real party in interest; grantees and assignees.

I. REAL PARTIES IN INTEREST.

A. In General.

Editor's Note.—For case law survey on pleading and parties, see 43 N.C.L. Rev. 873 (1965); 44 N.C.L. Rev. 897 (1966).

For comment on contribution among joint tort-feasors and rights of insurers, see 44 N.C.L. Rev. 142 (1965).

A motion in the cause is the prosecution of an action within the meaning of this section. Howard v. Boyce, 266 N.C. 572, 146 S.E.2d 828 (1966).

Plaintiff Must Be Real Party in Interest.—Before one can call on a court to redress or protect against a wrongful act done or threatened, he must allege that he is or will in some manner be adversely affected thereby. He must be the real party in interest. State v. Lenoir, 249 N. C. 96, 105 S. E. (2d) 411 (1958).

For nearly a century North Carolina statutory law has required every action to be prosecuted in the name of the real party in interest. Howard v. Boyce, 266 N.C. 572, 146 S.E.2d 828 (1966).

A right of action accrues because of the wrong done plaintiff; he cannot maintain an action to redress a wrong done the other party to a contract. Walker v. Nicholson, 257 N. C. 744, 127 S. E. (2d) 564 (1962).

Who Is Real Party in Interest.—A real party in interest is a party who is benefited or injured by the judgment in the case. Parnell v. Nationwide Mut. Ins. Co., 263 N.C. 445, 139 S.E.2d 723 (1965).

An interest which warrants making a person a party is not an interest in the action involved merely, but some interest in the subject matter of the litigation. Parnell v. Nationwide Mut. Ins. Co., 263 N.C. 445, 139 S.E.2d 723 (1965).

Action Dismissed.—When it appears that the real party in interest is not before the court, the proceeding should be dismissed. Howard v. Boyce, 266 N.C. 572, 147 S.E.2d 828 (1966).

Sole Stockholder. — In a suit instituted by a corporation wherein all the stock was owned by one person, the sole stockholder was a real party in interest and was a necessary party plaintiff. Terrace, Inc. v Phoenix Indemnity Co., 243 N C. 595, 91 S. E. (2d) 584 (1956).

Administrator C. T. A. — Where notes were bequeathed to testator's widow for life and she, as executrix, distributed them to herself, and there was no evidence that they were not endorsed or that such distribution did not pass title to the notes from her as representative, plaintiff, as testator's administrator c. t. a., did not show that he was the real party in interest under this section to recover the notes from the widow's administrators. Upon distribution the property had inured to the benefit of the life tenant and remaindermen and was not subject to further administration. Darden v. Boyette, 247 N. C. 26, 100 S. E. (2d) 359 (1957).

Allegations Disclosing Plaintiff Not Real Party in Interest.—In an action on a contract instituted by an individual, allegations that, although the contract was made in the name of plaintiff, the negotiations leading to the contract were carried on by a named corporation, that the contract was for the benefit of the corporation, and that plaintiff had assigned his interest in the contract to the corporation, without allegation that plaintiff was bringing the action as trustee for the corporation nor facts from which a trusteeship may be inferred, disclose that plaintiff is not the real party in interest and that he is without any right to maintain the action. Skinner v. Empresa Transformadora De Productos Agropecuarios, S. A., 252 N. C. 320, 113 S. E. (2d) 717 (1960).

Applied in First Union Nat'l Bank v. Hackney, 266 N.C. 17, 145 S.E.2d 352 (1965).

Cited in Locklear v. Oxendine, 233 N. C. 710, 65 S. E. (2d) 673 (1951); Bizzell v. Bizzell, 237 N. C. 535, 75 S. E. (2d) 536 (1953); Queen City Coach Co., v. Burrell, 241 N. C. 432, 85 S. E. (2d) 688 (1955); Hendrix v. B. & L. Motors, Inc., 241 N. C. 644, 86 S. E. (2d) 448 (1955); McGill v. Bison Fast Freight, Inc., 245 N C. 469, 96 S. E. (2d) 438 (1957); Adams v. Flora Macdonald College, 251 N. C. 617, 111 S. E. (2d) 859 (1960); Branch Banking & Trust Co. v. Bank of Washington, 255 N. C. 205, 120 S. E. (2d) 830 (1961); Gulf Life Ins. Co. v. Waters, 255 N C. 553, 122 S. E. (2d) 387 (1961); Crawford v. General Ins. & Realty Co., 266 N.C. 615, 146 S.E.2d 651 (1966).

B. Personal Actions.

Subrogated Insurer Must Sue in Its Own Name.—Where the insurance paid the insured covers the loss in full, the insurance company, as a necessary party plaintiff, must sue in its own name to enforce its right of subrogation against the tort-feasor. This is true because the insurance company in such case is entitled to the entire fruits of the action, and must be regarded as the real party in interest under this section. Burgess v. Trevathan, 236 N. C. 157, 72 S. E. (2d) 231 (1952), commented on in 31 N. C. Law Rev. 224; Milwaukee Ins. Co. v. McLean Trucking Co., 256 N. C. 721, 125 S. E. (2d) 25 (1962); Shambley v. Jobe-Blackley Plumbing & Heating Co., 264 N.C. 456, 142 S.E.2d 18 (1965). See Taylor v. Green, 242 N. C. 156, 87 S. E. (2d) 11 (1955).

Where insured property is destroyed or damaged by the tortious act of a third party, and the insurance company pays its insured, the owner, the full amount of his loss, the insurance company is subrogated to the owner's (indivisible) cause of action against such third person. In such case, the insurance company, as the real party in interest under this section, may maintain such action in its name and for its benefit. Herring v. Jackson, 255 N. C. 537, 122 S. E. (2d) 366 (1961); Jewell v. Price, 259 N. C. 345, 130 S. E. (2d) 668 (1963).

An insurance company, as plaintiff, may bring suit in its own name against parents of minor who set fire to school property upon a claim to which it has become subrogated by payment in full of its loss to the school board under the provisions of its policy of insurance, who, pursuant to the provisions of § 1-538.1, would have been able to bring such an action in its own name. General Ins. Co. of America v. Faulkner, 259 N. C. 317, 130 S. E. (2d) 645 (1963).

Where there has been an accident involving an automobile insured against loss by collision or upset, the insurance company becomes a necessary party plaintiff and must sue in its own name to enforce its right of subrogation where it has paid the insured the loss in full. Security Fire & Indem. Co. v. Barnhardt, 267 N.C. 302, 148 S.E.2d 117 (1966).

And Not in Name of Injured Party.—An insurer paying the judgment obtained by the injured party against one tort-feasor has no right of action to enforce contribution against the other tort-feasor, and cannot acquire such right of action by the device of a "loan" to the injured party payable only in the event and to the extent of any recovery which the injured party may obtain against the other tort-feasor, and in an action for contribution in the name of the injured party, maintained solely in the interest of the insurer, the injured party is not a real party in interest. Herring v. Jackson, 255 N. C. 537, 122 S. E. (2d) 366 (1961).

Where an insurance company pays the insured in part only for the loss sustained it is subrogated pro tanto in equity to the rights of the insured against the tort-feasor and by virtue of that fact it holds an equitable interest in the subject matter of the action and becomes a proper although not a necessary party to the litigation. Taylor v. Green, 242 N. C. 156, 87 S. E. (2d) 11 (1955).

Where there has been an accident involving an automobile insured against loss by collision or upset, the insured is a necessary party plaintiff where the insurance company has paid only a portion of the loss. Security Fire & Indem. Co. v. Barnhardt, 267 N.C. 302, 148 S.E.2d 117 (1966).

Liability Insurance Carrier Not Proper Party Defendant.—In an action ex delicto for damages proximately caused by the alleged negligence of the defendant, his liability insurance carrier is not a proper party defendant. Taylor v. Green, 242 N. C. 156, 87 S. E. (2d) 11 (1955).

Generally an employee may maintain an action to enforce provisions inserted for his benefit in a collective labor contract made between a labor union and the employer, particularly in regard to wage provisions. Lammonds v. Aleo Mfg. Co., 243 N. C. 749, 92 S. E. (2d) 143 (1956).

Plaintiff employee alleged the existence of a collective labor contract between defendant and a labor union, that plaintiff was required to work under an increased work load assignment in violation of the contract, and that such violation entitled plaintiff to back pay under the terms of the contract. It was held that the complaint states a cause of action in plaintiff's favor as a third party beneficiary. Lammonds v. Aleo Mfg. Co., 243 N. C. 749, 92 S. E. (2d) 143 (1956).

Agent as Real Party in Interest.—

The appointment of an agent does not divest the owner of his property rights. The agent is not the real party in interest and cannot maintain an action. Morton v. Thornton, 259 N. C. 697, 131 S. E. (2d) 378 (1963).

An agent is not the real party in interest and cannot maintain an action. Parnell v. Nationwide Mut. Ins. Co., 263 N.C. 445, 139 S.E.2d 723 (1965).

Since the enactment of this section it has been consistently held that an agent for another could not maintain an action in his name for the benefit of his principal. Howard v. Boyce, 266 N.C. 572, 146 S.E.2d 828 (1966).

III. ASSIGNMENTS.

Assignment Defined.—An assignment is substantially a transfer, actual or constructive, with the clear intent at the time to part with all interest in the thing transferred and with a full knowledge of the rights so transferred. Morton v. Thornton, 259 N. C. 697, 131 S. E. (2d) 378 (1963).

Effect in General.—

In accord with 1st paragraph in original. See Standard Amusement Co. v. Tarkington, 247 N. C. 444, 101 S. E. (2d) 398 (1958).

The one to whom there has been an absolute assignment is the "real party in interest" rather that the assignor who has parted with all interest therein. Commerce Mfg. Co. v. Blue Jeans Corp., 146 F. Supp. 15 (1956).

An assignee of a contractual right is a real party in interest and may maintain the action. Morton v. Thornton, 259 N. C. 697, 131 S. E. (2d) 378 (1963).

Assignee Sues in Own Name.—

If the assignee elected to sue on the judgment, the action could only be maintained in the name of the assignee. Safeco Ins. Co. of America v. Nationwide Mut. Ins. Co., 264 N.C. 749, 142 S.E.2d 694 (1965).

Assignor of Bank Deposit May Not Maintain Action.—As a consequence of the requirement that every action be prosecuted in the name of the real party in interest, a depositor cannot maintain an action against a bank to recover a deposit when it appears from his own evidence that he has assigned the deposit to a third person and has no further interest in it. Lipe v. Guilford Nat. Bank, 236 N. C. 328, 72 S. E. (2d) 759 (1952).

Assignee Takes Subject to Set-Offs and Other Defenses.—An assignee of a chose in action is by this section given the right to maintain the action in his name but that right is circumscribed by the express provision that it shall be without prejudice to any offset or other defense existing at the time of the assignment. Overton v. Tarkington, 249 N. C. 340, 106 S. E. (2d) 717 (1959).

Where plaintiff, according to the allegations of its complaint, became the assignee of a lease, a non-negotiable chose in action, it took it subject to any set-off or other defense which the lessees may have had against its assignors based on facts existing at the time of, or before notice of, the assignment, even though it bought it for value, and in good faith. Standard Amusement Co. v. Tarkington, 247 N. C. 444, 101 S. E. (2d) 398 (1958).

A claim for unpaid wages is a chose in action which may be assigned and, when assigned, the assignee may maintain an action thereon in his own name. Morton v. Thornton, 257 N. C. 259, 125 S. E. (2d) 464 (1962).

§ 1-63. Action by executor or trustee.

A trustee may sue in his own name, or he may join his cestui que trust. Ingram v. Nationwide Mut. Ins. Co., 258 N. C. 632, 129 S. E. (2d) 222 (1963).

The trustee of an express trust may sue without joining the cestui que trust. Richardson v. Richardson, 261 N.C. 521, 135 S.E.2d 532 (1964).

Where a judgment is assigned to a trustee for the benefit of a judgment debtor, who is entitled to indemnity, the trustee may maintain the action for indemnity without joining the cestui que trust. Ingram v. Nationwide Mut. Ins. Co., 258 N. C. 632, 129 S. E. (2d) 222 (1963).

Commissioners to Sell Land and Pay Taxes.—Where a consent judgment directs named persons to sell and convey land, to collect the proceeds, to pay the taxes lawfully due, and to distribute the balance as directed, the persons named are trustees of an express trust within the purview of this section, notwithstanding that the judgment denominates them as commissioners. Therefore, such persons were authorized to maintain an action for the recovery of taxes unlawfully paid without the joinder of the beneficial owners of the property. Rand v. Wilson County, 243 N. C. 43, 89 S. E. (2d) 779 (1955).

Where Property Has Been Distributed and Administrator Is Functus Officio. — Where a widow as executrix distributed in settlement the remaining personalty to herself as life tenant in accordance with the will, and the property then inured to the benefit of the remaindermen, she became functus officio as to such property. An administrator c.t.a., appointed after her death, was likewise functus officio and was not empowered by this section to maintain an action to recover such property from her administrators, since it was no

longer part of his testator's estate and not subject to further administration. Darden v. Boyette, 247 N. C. 26, 100 S. E. (2d) 359 (1957).

Cited in Dickey v. Herbin, 250 N. C. 321, 108 S. E. (2d) 632 (1959).

§ 1-64. Infants, etc., sue by guardian or next friend.

Distinction between Next Friend and Guardian ad Litem.—

See Thompson v. Lassiter, 246 N. C. 34, 97 S. E. (2d) 492 (1957); Teele v. Kerr, 261 N.C. 148, 134 S.E.2d 126 (1964).

Duty of Next Friend.—It is the duty of a next friend to represent the infant, see that the witnesses are present at the trial of the infant's case, and to do all things which are required to secure a judgment favorable to the infant. Teele v. Kerr, 261 N.C. 148, 134 S.E.2d 126 (1964).

The power of a next friend is strictly limited to the performance of the precise duty imposed upon him by the order appointing him; that is, the prosecution of the particular action in which he was appointed. Teele v. Kerr, 261 N.C. 148, 134 S.E.2d 126 (1964).

Habeas corpus under § 17-39, pertaining to the determination of a contest between husband and wife over the custody and control of their child, is no part of the civil procedure pertaining to "actions and special proceedings" within the purview of this section. In re Custody of Allen, 238 N. C. 367, 77 S. E. (2d) 907 (1953).

Failure to Plead Infancy of Petitioner as Defense.—Where a minor petitioned for a writ of habeas corpus under § 17-39 in her own name, and not by next friend, and the record on appeal failed to show that the respondent pleaded the infancy of the petitioner as a defense, it was considered as waived. In re Custody of Allen, 238 N. C. 367, 77 S. E. (2d) 907 (1953).

Satisfaction of Judgment in Favor of Infant. — Under the statutes of this State, only the clerk or the legal guardian of an infant has authority to receive payment and satisfy a judgment rendered in favor of an infant, and the defendant pays the judgment to the clerk of the superior court, who holds the funds until the minor becomes twenty-one or until a general guardian is appointed for him, unless the sum is $1,000.00 or less, when he may disburse it himself under the terms of § 2-53. Teele v. Kerr, 261 N.C. 148, 134 S.E.2d 126 (1964).

Applied in Flynt v. Flynt, 237 N. C. 754, 75 S. E. (2d) 901 (1953); Mahan v. Read, 240 N. C. 641, 83 S. E. (2d) 706 (1954).

Stated in Rowland v. Beauchamp, 253 N. C. 231, 116 S. E. (2d) 720 (1960).

Cited in Bizzell v. Bizzell, 237 N. C. 535, 75 S. E. (2d) 536 (1953); Moore v. Order Minor Conventuals, 164 F. Supp. 711 (1958).

§ 1-65: Transferred to § 1-65.1 by Session Laws 1955, c. 1366.

§ 1-65.1. Infants, etc., defend by guardian ad litem.—In all actions and special proceedings when any of the defendants are infants, idiots, lunatics, or persons non compos mentis whether residents or nonresidents of this State, they must defend by their general or testamentary guardian if they have one within this State, and if they have no general or testamentary guardian in the State and any of them has been summoned, the court in which said action or special proceeding is pending, upon motion of any of the parties, may appoint some discreet person to act as guardian ad litem, to defend in behalf of such infants, idiots, lunatics, or persons non compos mentis and fix and tax his fee as part of the costs. The guardian so appointed shall, if the cause is a civil action file his answer to the complaint within the time required for other defendants, unless the time is extended by the court; and if the cause is a special proceeding, a copy of the complaint, with the summons, must be served on him. After twenty days notice of the summons and complaint in the special proceeding, and after answer filed as above prescribed in the civil action, the court may proceed to final judgment as effectually and in the same manner as if there had been personal service upon the said infant, idiot, lunatic, or person non compos mentis, defendants. (C. C. P., s. 59, 1870-1, c. 233, s. 5; 1871-2, c. 95, s. 2; Code, s. 181; Rev., s. 406; C. S., s. 451; 1955, c. 1366; 1957, c. 249.)

Editor's Note. — Former § 1-65 was amended by changing its numbering to 1-65.1 and by adding the three following sections.

The 1957 amendment added the words "and fix and tax his fee as part of the costs" immediately after the word "mentis" in line nine.

Infants are favorites of the courts, and the courts are duty-bound to protect their rights and interests in all actions and proceedings whether they are represented by guardians or not, and the Supreme Court will scan with extra care all records affecting the interest of minors. Tart v. Register, 257 N. C. 161, 125 S. E. (2d) 754 (1962).

Whether a new trial will be ordered for failure to appoint a guardian ad litem will depend upon the circumstances of the particular case as to whether the infant or infants have been fully protected in their rights and property, and a new trial will not be granted for mere technical error which could have affected the result, but only for error which is prejudicial or harmful. Tart v. Register, 257 N. C. 161, 125 S. E. (2d) 754 (1962).

Where an infant has a general guardian, such guardian is the only one who can defend on behalf of the infant, and defense by a subsequently appointed guardian ad litem is a nullity. Narron v. Musgrave, 236 N. C. 388, 73 S. E. (2d) 6 (1952).

Judgment against Infant Held Void.—Where an infant is not served but his guardian ad litem appears and answers but interposes no real defense, and the court enters judgment on the day of the appointment of the guardian ad litem, the judgment against the infant is void for want of jurisdiction. Narron v. Musgrave, 236 N. C. 388, 73 S. E. (2d) 6 (1952).

Inquisition to Determine Sanity of Defendant Not Required.—The court is under duty to appoint a guardian ad litem for a defendant who is non compos mentis and who has no general guardian, and an inquisition to determine the sanity of the defendant is not a condition precedent to such appointment. Moore v. Lewis, 250 N. C. 77, 108 S. E. (2d) 26 (1959).

Applied in In re Dunn, 239 N. C. 378, 79 S. E. (2d) 921 (1954); Bell v. Smith, 263 N.C. 814, 140 S.E.2d 542 (1965).

§ 1-65.2. Appointment of guardian ad litem for unborn persons.—In all actions and special proceedings in rem and quasi in rem and in all actions and special proceedings which involve the construction of wills, trusts and contracts or any instrument in writing, or which involve the determination of the ownership of property or the distribution of property, if there is a possibility that some person may thereafter be born who, if then living, would be a necessary or proper party to such action or special proceeding, the court in which said action or special proceeding is pending, upon motion of any of the parties, may appoint some discreet person to act as guardian ad litem, to defend on behalf of such unborn person. No prior service of summons or other process upon such unborn person shall be required, and service upon the guardian ad litem appointed for such unborn person shall have the same force and effect as service upon such unborn person would have had if such person had been living. All proceedings by and against the said guardian ad litem after appointment shall be governed by all provisions of the law applicable to guardians ad litem for living persons. (1955, c. 1366.)

Applied in Hicks v. Hicks, 259 N. C. 387, 130 S. E. (2d) 666 (1963).

§ 1-65.3. Appointment of guardian ad litem for corporations, trusts or other entities not in existence.—In all actions and special proceedings which involve the construction of wills, trusts and contracts which involve the determination of the ownership of property or the distribution of property pursuant to the provisions of such will, trust or contract, if such will, trust or contract provides benefits for or distributions to a corporation, a trust or an entity thereafter to be formed for the purpose of carrying into effect some provision of the said will, trust or contract, the court in which said action or special proceeding is pending upon motion of any of the parties, may appoint some discreet person to act as guardian ad litem for such corporation, trust or other entity and to defend on behalf of such corporation, trust or other entity. No prior service of summons or other process upon such corporation, trust or other entity shall be required, and service upon the guardian ad litem appointed for such corporation, trust or other entity shall have the same force and effect as service upon such corporation, trust or entity would have had if such corporation, trust or other entity had been in existence. All proceedings by and against the said guardian ad litem after appoint-

ment shall be governed by all provisions of the law applicable to guardians ad litem for living persons. (1955, c. 1366.)

§ 1-65.4. Retroactive effect; miscellaneous provisions.—The remedies provided by §§ 1-65.1 to 1-65.3 are in addition to any other remedies authorized or permitted by law, and they shall not be construed to repeal or to limit the doctrine of virtual representation or any other law or rule of law by which unborn persons or nonexistent corporations, trusts or other entities may be represented in or bound by any judgment or order entered in any action or special proceeding. Sections 1-65.1 to 1-65.3 shall apply to all pending actions and special proceedings to which they may be constitutionally applicable. All judgments and orders heretofore entered in any action or special proceeding in which a guardian or guardians ad litem have been appointed for any unborn person or persons or any nonexistent corporations, trust or other entities, are hereby validated as of the several dates of entry thereof in the same manner and to the full extent that they would have been valid if §§ 1-65.1 to 1-65.3 had been in effect at the time of the appointment of such guardians ad litem; provided, however, that the provisions of this sentence shall be applicable only in such cases and to the extent to which the application thereof shall not be prevented by any constitutional limitation. (1955, c. 1366.)

§ 1-65.5. When next friend or guardian ad litem not required in domestic relations.—Notwithstanding the provisions of G.S. 1-64 and G.S. 1-65, an infant 18 years of age or over who is competent to marry is competent to prosecute or defend an action or proceeding for his or her absolute divorce, divorce from bed and board, alimony pendente lite, or permanent alimony with or without divorce, or an action or proceeding for the custody and support of his or her child, together with counsel fees when they are allowable. In such actions or proceedings the appointment of a guardian ad litem or a next friend is not required. (1967, c. 939.)

Editor's Note.—The above section in the 1967 act was numbered 1-65.1. Since sections numbered 1-65.1 through 1-65.4 already appeared in the Supplement, the section added by the 1967 act has been renumbered 1-65.5.

§ 1-67. Guardian ad litem to file answer.

Cited in Thompson v. Lassiter, 246 N. C. 34, 97 S. E. (2d) 492 (1957).

§ 1-68. Who may be plaintiffs.

Editor's Note.—

For article on permissive joinder of parties and causes, see 34 N. C. Law Rev. 405.

The object of this section is to permit all persons, who come within its terms, to unite as parties plaintiff, so that a single judgment may be rendered completely determining the controversy for the protection of all concerned. Hall v. DeWeld Mica Corp., 244 N. C. 182, 93 S. E. (2d) 56 (1956); Whitehead v. Margel, 220 F. Supp. 933 (W.D.N.C. 1963).

Basis of This Section and § 1-69.—The code of civil procedure is bottomed on the basic concept that a court ought to bring before it as parties in a particular action all persons who may have interests either by way of rights or by way of liabilities in the subject matter of the action so that a single judgment may be rendered effectually determining all such rights and liabilities for the protection of all concerned. Burgess v. Trevathan, 236 N. C. 157, 72 S. E. (2d) 231 (1952).

There May Be Several Plaintiffs, etc.—In accord with 2nd paragraph in original. See Peed v. Burleson's Inc., 242 N. C. 628, 89 S. E. (2d) 256 (1955).

While it is not necessary that all parties plaintiff have the identity of interest required by the common law, it is necessary under the Code that the interests of parties plaintiff be consistent. Burton v. Reidsville, 240 N. C. 577, 83 S. E. (2d) 651 (1954).

Where defendant is liable to one of two parties in the alternative, so that if he is liable to one he is not liable to the other, and defendant is not sure to which of the parties liability obtains, he is entitled to

join both as plaintiffs. American Air Filter Co. v. Robb, 267 N.C. 583, 148 S.E.2d 580 (1966).

Husband and Wife as Plaintiffs.—Where plaintiffs, husband and wife, alleged that they own their home in which they live and that defendant's nearby mining operations have resulted in damage to it, the allegation that they own their home is sufficient to show that both have an interest in the property, and therefore both are properly joined as plaintiffs under this section. Hall v. DeWeld Mica Corp., 244 N. C. 182, 93 S. E. (2d) 56 (1956).

§ 1-69. Who may be defendants.

Editor's Note.—

For article on permissive joinder of parties and causes, see 34 N. C. Law Rev. 405. For note on alternative joinder of defendants, see 42 N.C.L. Rev. 242 (1963).

Basis of Section.—See note under § 1-68.

This section manifestly does not authorize a misjoinder of causes of action and of parties. Such was not its purpose. A complaint is demurrable now as before the enactment of this section, for a misjoinder of parties, and of causes of action. Conger v. Travelers Ins. Co., 260 N. C. 112, 131 S. E. (2d) 889 (1963).

When it enacted this section, the legislature did not contemplate multifariousness or the determination of two separate, distinct and unconnected causes of action between plaintiff and two or more defendants in one law suit. Conger v. Travelers Ins. Co., 260 N. C. 112, 131 S. E. (2d) 889 (1963).

It Is a "Device of Convenience."—This section which authorizes a doubtful plaintiff to join two or more defendants in the alternative in order to ascertain which is liable to him is "a device of convenience" and should be construed so as to prevent a multiplicity of suits. However, to do this it is not necessary to authorize a joinder in the alternative of defendants against whom unrelated distinct causes of action are asserted. Conger v. Travelers Ins. Co., 260 N. C. 112, 131 S. E. (2d) 889 (1963).

Subject to Limitations of § 1-123.—Section 1-73, authorizing the court to bring in new parties under certain conditions, and this section, prescribing who may be defendants are subject to the limitations of § 1-123 prescribing what causes may be joined, and it is improper to join additional parties defendant to litigate a separate cause of action between the original defendant and such additional defendant when such cause may not be properly joined with the cause of action alleged by the original plaintiff against the original defendant. Gulf Life Ins. Co. v. Waters, 255 N. C. 553, 122 S. E. (2d) 387 (1961).

The provisions of this section will not be construed to authorize the joinder of unrelated and distinct causes of action against separate defendants, in contravention of § 1-123, but when the allegations of the complaint tell a connected story and plaintiff does not assert any inconsistent positions therein, and the action affects both defendants in that if the one is liable the other is not, this section applies and demurrer for misjoinder should be overruled. Conger v. Travelers Ins. Co., 260 N. C. 112, 131 S. E. (2d) 889 (1963).

And Requiring One Cause of Action.—This section permits the joinder of defendants in the alternative where there is but one cause of action. For instance, if A wishes to sue B, the driver of a motor vehicle, and his employer for B's negligence but is uncertain whether C or D was the principal, he may join them both as defendants in the alternative. Conger v. Travelers Ins. Co., 260 N. C. 112, 131 S. E. (2d) 889 (1963).

Joinder of Insured in Insurer's Action to Enforce Subrogation. — The insured may be properly joined as a party defendant under this section even in an action where the insurance company sues the tort-feasor to enforce subrogation on the theory that the insured has been idemnified by it for the full amount of the loss. This is true because it frequently is not ascertainable until the verdict establishes the amount of the damages whether the insurer is the sole or partial owner of the cause of action, since, if the amount of damages set by the jury is less than the insurance paid, insurer is the sole owner, whereas, if the amount is greater, insurer is only a partial owner. Burgess v. Trevathan, 236 N. C. 157, 72 S. E. (2d) 231 (1952), commented on in 31 N. C. Law Rev. 224.

Joinder of Husband and Wife in Action for Negligent Use of Property Held as Tenants by Entirety.—A husband and wife, holding property as tenants by the entirety, may properly be named defendants and held jointly liable for injuries resulting from the negligent use of the property, unless there is evidence shown at the trial that the husband exercised such exclusive control of the property as to exonerate the wife from liability. Whitehead v. Margel, 220 F. Supp. 933 (W.D.N.C. 1963).

Husbands Sued on Trade Acceptances and Their Wives as Guarantors. — There was no misjoinder of parties and causes of action where the plaintiff in the same proceeding sued husbands on trade acceptances, and sued their wives on guaranties executed to secure such trade acceptances. Arcady Farms Co. v. Wallace, 242 N. C. 686, 89 S. E. (2d) 413 (1955).

In an action by a partner for the dissolution of the partnership and for the proper application of the partnership assets, plaintiff partner may join as a defendant the transferee of the defendant partner upon allegation that the transfer was wrongful, in order to have the entire controversy settled in one action and plaintiff is not compelled first to bring an action to establish the fact of the existence of the partnership and then another action for an accounting. Bright v. Williams, 245 N. C. 648, 97 S. E. (2d) 247 (1957).

Where the wrongful acts of two or more persons concur in producing a single injury and with or without concert between them, they may be treated as joint tortfeasors and, as a rule, sued separately or together at the election of plaintiffs. Chumley v. Great Atlantic & Pacific Tea Co., 191 F. Supp. 254 (1961), citing Raulf v. Elizabeth City Elec. Light, etc., Co., 176 N. C. 691, 97 S. E. 236 (1918).

Holder of Note Not Named in Deed of Trust.—Where the note which a deed of trust purports to secure is payable to bearer, the plaintiff alleges it is "a false and fictitious paper writing" and that the identity of the supposed bearer "remains unknown to plaintiff," the trustee in the deed of trust which purports to secure the payment of such note is a party to the action and has participated actively in its defense, whatever may be the situation where the holder of the indebtedness is named in the deed of trust and known, the holder of the alleged note cannot be deemed a necessary party to the action to set aside the deed of trust which purports to secure it. Virginia-Carolina Laundry Supply Corp. v. Scott, 267 N.C. 145, 148 S.E.2d 1 (1966).

Applied in Casey v. Grantham, 239 N. C. 121, 79 S. E. (2d) 735 (1954)

Quoted in part in Sellers v Motors Ins. Corp., 233 N. C. 590, 65 S. E. (2d) 21 (1951).

Cited in Cain v. Corbett, 235 N. C. 33, 69 S. E. (2d) 20 (1952).

§ 1-69.1. Unincorporated associations; suit by or against.—All unincorporated associations, organizations or societies, foreign or domestic, whether organized for profit or not, may hereafter sue or be sued under the name by which they are commonly known and called, or under which they are doing business, to the same extent as any other legal entity established by law and without naming any of the individual members composing it. Any judgments and executions against any such association, organization or society shall bind its real and personal property in like manner as if it were incorporated. This section shall not apply to partnerships or co-partnerships which are organized to engage in any business, trade or profession. (1955, c. 545, s. 3.)

Not Retroactive. — This section does not apply to actions filed prior to its effective date. Youngblood v. Bright, 243 N. C. 599, 91 S. E. (2d) 559 (1956).

The words "sue" and "be sued" used in this statute include the natural and appropriate incidents of legal proceedings, and embrace all civil process incident to the commencement or continuance of legal proceedings. J. A. Jones Constr. Co. v. Local Union 755, etc., 246 N. C. 481, 98 S. E. (2d) 852 (1957).

Service of Process. — No provision of this section purports to prescribe the manner in which service of process is to be made on such unincorporated association. The only statute prescribing the manner in which such service may be made is § 1-97 (6). Melton v. Hill, 251 N. C. 134, 110 S. E. (2d) 875 (1959).

An unincorporated labor union, which is doing business in North Carolina by performing acts for which it was formed is suable in this State as a separate legal entity. J. A. Jones Constr. Co. v. Local Union 755, etc., 246 N. C. 481, 98 S. E. (2d) 852 (1957).

An unincorporated labor union doing business in North Carolina by performing acts for which it was formed can sue and be sued as a separate legal entity in the courts of this State, and may be served with process in the manner prescribed by statute. Martin v. Local 71, International Brotherhood of Teamsters, etc., 248 N. C. 409, 103 S. E. (2d) 462 (1958); Gainey v. Local 71, International Brotherhood of Teamsters, etc., 252 N. C. 256, 113 S. E. (2d) 594 (1960).

An unincorporated labor union may be sued in the courts of this State as a legal entity separate and apart from its members.

R. H. Bouligny, Inc. v. United Steelworkers of America, AFL-CIO, 270 N.C. 160, 154 S.E.2d 344 (1967).

An unincorporated labor union, as a legal entity separate and apart from its members, may be held liable in damages for torts committed by its employees or agents acting in the course of their employment. R. H. Bouligny, Inc. v. United Steelworkers of America, AFL-CIO, 270 N.C. 160, 154 S.E.2d 344 (1967).

Evidence was sufficient to support a finding that a labor union was doing business in North Carolina by performing some of the acts for which it was formed. Reverie Lingerie, Inc. v. McCain, 258 N. C. 353, 128 S. E. (2d) 835 (1963).

Applied in Sizemore v. Maroney, 263 N.C. 14, 138 S.E.2d 803 (1964).

Cited in Solon Lodge v. Ionic Lodge, 245 N. C. 281, 95 S. E. (2d) 921 (1957); Glover v. Brotherhood of Railway & Steamship Clerks, etc., 250 N. C. 35, 108 S. E. (2d) 78 (1959); Walker v. Nicholson, 257 N. C. 744, 127 S. E. (2d) 564 (1962).

§ 1-70. Joinder of parties; action by or against one for benefit of a class.—Of the parties to the action, those who are united in interest must be joined as plaintiffs or defendants, but if the consent of any one who should have been joined as plaintiff cannot be obtained, he may be made a defendant, the reason thereof being stated in the complaint. When the question is one of a common or general interest of many persons or where the parties are so numerous that it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all. (C. C. P., s. 62; Code, s. 185; Rev., s. 411; C. S., s. 457. 1933, c. 182; 1955, c. 545, s. 2.)

Editor's Note.—

The 1955 amendment, effective July 1, 1955, struck out the former last sentence and proviso relating to unincorporated, beneficial associations, fraternal benefit orders, etc. For present statute relating to such associations, see § 1-69.1.

For note on capacity of unincorporated associations to sue and be sued, see 30 N. C. Law Rev. 465.

This section merely provides a ready means for dispatch of business. Cocke v. Duke University, 260 N. C. 1, 131 S. E. (2d) 909 (1963).

Federal Counterpart of Section.—This section has its counterpart in Rule 23a of the Federal Civil Rules of Procedure. Cocke v. Duke University, 260 N. C. 1, 131 S. E. (2d) 909 (1963).

Proper parties are those whose interest might be affected by a decree, but the court can proceed to adjudicate the rights of others without necessarily affecting them, and whether they shall be brought in or not is within the discretion of the court. Pickelsimer v. Pickelsimer, 255 N. C. 408, 121 S. E. (2d) 586 (1961).

Necessary or indispensable parties are those whose interests are such that no decree can be rendered which will not affect them, and therefore the court cannot proceed until they are brought in. Pickelsimer v. Pickelsimer, 255 N. C. 408, 121 S. E. (2d) 586 (1961).

Community of Interest.—Plaintiff is authorized by this section to bring an action in behalf of himself and other owners of lots in a cemetery who by reason of similar representations were induced to buy lots. Such lot owners have a community of interest. Mills v. Carolina Cemetery Park Corp., 242 N. C. 20, 86 S. E. (2d) 893 (1955).

Plaintiff Must Show Authority to Join Causes of Action in Favor of Other Parties Similarly Situated.—A party plaintiff may not join with his own cause of action against a defendant causes of action against the same defendant in favor of other parties similarly situated, in the absence of a showing of authority to bring such actions in their behalf. Nodine v. Goodyear Mortgage Corp., 260 N.C. 302, 132 S.E.2d 631 (1963).

Two or more plaintiffs representing opposing interests with reference to the main purpose of the action may not be joined. Burton v. Reidsville, 240 N. C. 577, 83 S. E. (2d) 651 (1954).

Intervening Plaintiffs Whose Interests Are Adverse to Original Plaintiffs.—In an action filed by taxpayers to enjoin city from destroying low cost rental units belonging to city, interveners were not entitled to come into case as parties plaintiff where their pleadings expressly denied all material allegations of the complaint and attempted to assert claims wholly antagonistic to those alleged by the plaintiffs. Burton v. Reidsville, 240 N. C. 577, 83 S. E. (2d) 651 (1954).

Potential Beneficiaries of Trust.—Where the potential beneficiaries of a trust were so numerous that it was practically impossible to bring them all before the court in an action seeking modification of the trust, a beneficiary of each class could be made a party and represent the class. The

court's jurisdiction over the trust was not dependent on acquiring personal jurisdiction over every potential beneficiary. Cocke v. Duke University, 260 N. C. 1, 131 S. E. (2d) 909 (1963).

Claims for Wages.—The claim for unpaid wages due an employee can be joined in one action with similar claims assigned to that plaintiff employee, and if the claims are assigned to joint assignees, all assignees must be parties and recover in their joint right. Morton v. Thornton, 257 N. C. 259, 125 S. E. (2d) 464 (1962).

Joint Holders of Bill or Note.—Where a bill or note is made payable to several persons, or is endorsed or assigned to several, they are joint holders and must sue jointly as such. Underwood v. Otwell, 269 N.C. 571, 153 S.E.2d 40 (1967).

Foreclosure of Deed of Trust Securing Note Payable to Joint Payees.—Where a note secured by a deed of trust is payable to joint payees, they must join as parties in an action to foreclose the deed of trust, and when one of them refuses to join as a plaintiff, such payee is properly joined as a defendant. Underwood v. Otwell, 269 N.C. 571, 153 S.E.2d 40 (1967).

Applied in McMillan v. Robeson County, 262 N.C. 413, 137 S.E.2d 105 (1964).

§ 1-71. Persons severally liable.

Quoted in part in Sellers v. Motors Ins. Corp., 233 N. C. 590, 65 S. E. (2d) 21 (1951).

§ 1-72. Persons jointly liable.

Nonsuit against One Alleged Party to Contract Does Not Constitute Variance Justifying Nonsuit against the Other. — When an action is brought against more than one defendant on what is alleged to be a joint contract, and the evidence shows that the agreement was made with only one defendant, nonsuit against the other defendants does not constitute a variance which justifies a nonsuit against the defendant with whom the agreement was made. The existence of other defendants is not an essential element of the contract. Tillis v. Calvine Cotton Mills, Inc., 251 N. C. 359, 111 S. E. (2d) 606 (1959).

§ 1-73. New parties by order of court.

The first provision of this section is mandatory. Simon v. Raleigh City Board of Education, 258 N. C. 381, 128 S. E. (2d) 785 (1963).

It Contemplates Only Making of Necessary Parties.—The first provision of this section contemplates only the making of necessary parties. Simon v. Raleigh City Board of Education, 258 N. C. 381, 128 S. E. (2d) 785 (1963).

Necessary Parties.—

In accord with 1st paragraph in original. See Hannah v. House, 247 N. C. 573, 101 S. E. (2d) 357 (1958); Manning v. Hart, 255 N. C. 368, 121 S. E. (2d) 721 (1961).

A person is a necessary party to an action when he is so vitally interested in the controversy involved in the action that a valid judgment cannot be rendered in the action completely and finally determining the controversy without his presence as a party. Manning v. Hart, 255 N. C. 368, 121 S. E (2d) 721 (1961).

This section makes it mandatory "when a complete determination of the controversy cannot be made without the presence of other parties" for these others to be made parties to the action. They are necessary parties. Overton v. Tarkington, 249 N. C. 340, 106 S. E. (2d) 717 (1959).

Under this section, a person who is a necessary party has an absolute right to intervene in a pending action, and the court commits error when it refuses to permit him to exercise such right. Garrett v. Rose, 236 N. C. 299, 72 S. E. (2d) 843 (1952).

Same—Definition.—A person is a necessary party to an action when he is so vitally interested in the controversy involved in the action that a valid judgment cannot be rendered in the action completely and finally determining the controversy without his presence as a party. Garrett v. Rose, 236 N. C. 299, 72 S. E. (2d) 843 (1952).

Same—In Action of Ejectment.—Where in an action of ejectment the controversy involved is whether the plaintiff owns the land in fee simple absolute, or whether the defendant owns the land in fee simple, subject to a charge payable in equal shares to the plaintiff and the personal representatives of six decedents, it is manifest that the personal representatives of these six decedents are so vitally interested in this controversy that a valid judgment cannot be rendered in this action completely and finally determining the controversy without their presence as parties. This being

true, they are necessary parties to the action. Garrett v. Rose, 236 N. C. 299, 72 S. E. (2d) 843 (1952).

Same — In Action by Owner against Contractor. — Where an owner sued his contractor for breach of contract and the contractor sought to have his subcontractor joined as a party defendant, it was held that this section was inapplicable. Gaither Corp. v. Skinner, 238 N. C. 254, 77 S. E. (2d) 659 (1953).

Same—Counterclaim. — If, prior to the institution of plaintiff's action, the defendant could have sued either the plaintiff, the other party, or both, there is no reason why the defendant is required to join the other party as a codefendant to its cause of action on a counterclaim against plaintiff. Bullard v. Berry Coal & Oil Co., 254 N. C. 756, 119 S. E. (2d) 910 (1961).

Defect of Parties.—A defect of parties occurs when there has been a failure to join either a plaintiff or a defendant whose presence in the suit is necessary to give the court jurisdiction and authority to decide the controversy. When such a defect appears from the complaint itself, it is a ground for demurrer, under subdivision 4 of § 1-127, and a fatal defect unless the necessary party is brought in under this section. Miller v. Jones, 268 N.C. 568, 151 S.E.2d 23 (1966).

Discretion of the Court.—

Ordinarily it is within the discretion of the court to permit proper parties to intervene. Childers v. Powell, 243 N. C. 711, 92 S. E. (2d) 65 (1956).

The granting or refusal of a petition for interpleader is within the sound discretion of the court. Simon v. Raleigh City Board of Education 258 N. C. 381, 128 S. E. (2d) 785 (1963).

Section Is Subject to Limitations of § 1-123.—This section, authorizing the court to bring in new parties under certain conditions, and § 1-69, prescribing who may be defendants, are subject to the limitations of § 1-123, prescribing what causes may be joined, and it is improper to join additional parties defendant to litigate a separate cause of action between the original defendant and such additional defendant when such cause may not be properly joined with the cause of action alleged by the original plaintiff against the original defendant. Gulf Life Ins. Co. v. Waters, 255 N. C. 553, 122 S. E. (2d) 387 (1961).

Where No Controversy between Parties.—Where in an action to establish and enforce a lien for labor on defendants' land, the defendants filed no answer, persons who claimed to hold a mortgage on the land were not entitled to intervene, since there was no controversy between plaintiff and defendant. Childers v. Powell, 243 N. C. 711, 92 S. E. (2d) 65 (1956).

Several parties may have a cause of action which arises out of the same motor vehicle collision, but that does not mean necessarily that all of them are required to litigate their respective rights or causes of action in one and the same action. Manning v. Hart, 255 N. C. 368, 121 S. E. (2d) 721 (1961)

Insurance Company That Has Paid Part of Plaintiff's Loss.—An insurance company which pays an insured for a part of the loss is a proper party to an action brought by the insured against a tortfeasor to recover the total amount of the loss, and may be brought into the action at the instance of the insured or the tortfeasor either in the capacity of an additional plaintiff or in the capacity of an additional defendant. Burgess v. Trevathan, 236 N. C. 157, 72 S. E. (2d) 231 (1952), commented on in 31 N. C. Law Rev. 224. See Jackson v. Baggett, 237 N. C. 554, 75 S. E. (2d) 532 (1953).

Third Sentence Is Codification of Remedy of Interpleader.—The third sentence of this section, in practical effect, is a codification of the remedy of interpleader. Simon v. Raleigh City Board of Education, 258 N. C. 381, 128 S. E. (2d) 785 (1963).

And Is Governed by Same Principles. — This section does not supersede the equitable remedy and is governed by the same doctrine and principles. Simon v. Raleigh City Board of Education, 258 N. C. 381, 128 S E. (2d) 785 (1963).

The material difference between a strict interpleader and a bill in the nature of an interpleader seems to be that in the latter the plaintiff may show that he has an interest in the subject matter of the controversy between the claimants. The claimants must still claim the same property, fund or a portion of it, from the plaintiff, and they must derive their claims to it from a common source unless this requirement has been abolished by statute. Simon v. Raleigh City Board of Education, 258 N. C. 381, 128 S. E. (2d) 785 (1963).

Essential Conditions for Equitable Remedy.—The equitable remedy of interpleader requires the existence of four essential conditions: 1. The same thing, debt or duty must be claimed by both or all the parties against whom the relief is demanded. 2. All their adverse titles or claims must be dependent, or be derived from a common source. 3. The person asking the relief—the plaintiff—must not have nor claim any interest in the subject matter. 4. He

must have incurred no independent liability to either of the claimants; that is, he must stand perfectly indifferent between them, in the position merely of a stakeholder. Simon v. Raleigh City Board of Education, 258 N. C. 381, 128 S. E. (2d) 785 (1963).

Remedy of Interpleader Denied Interested Party.—Since dismissal is one of the essentials of interpleader, the remedy must be denied an interested party. Simon v. Raleigh City Board of Education, 258 N. C. 381, 128 S. E. (2d) 785 (1963).

Applied in Story v. Walcott, 240 N. C. 622, 83 S. E. (2d) 498 (1954).

Cited in Moore v. Clark, 235 N. C. 364, 70 S. E. (2d) 182 (1952); United States v. Atlantic Coast Line R. Co., 237 F. (2d) 137 (1956).

§ 1-74. Abatement of actions.

Section Changes Common-Law Rule.—The rule of the common law that a personal right of action dies with the person has been changed by this section and § 28-172. Paschal v. Autry, 256 N. C. 166, 123 S. E. (2d) 569 (1962).

The procedure to determine whether a cause or right of action is to be continued and prosecuted by a personal representative or dismissed is prescribed by this section and § 1-75. Neal v. Associates Discount Corp., 260 N.C. 771, 133 S.E.2d 699 (1963).

Action for Wrongful Cutting and Removal of Timber.—If a cause of action for damages for the wrongful cutting and removal of timber from realty belonging to the deceased, accrued, in whole or in part, during his lifetime, the action for damages survives to his executors, and must be brought by his executors rather than by his heirs or devisees. However, if such an injury to the realty was committed after his death, the right of action belongs to his heirs or devisees. Paschal v. Autry, 256 N. C. 166, 123 S. E. (2d) 569 (1962).

When Action Abates.—

An action which survives disability or death does not abate until a judgment of the court is entered to that effect. Sawyer v. Cowell, 241 N. C. 681, 86 S. E. (2d) 431 (1955).

The power of the court to allow an action which survives the death of defendant to be continued against defendant's personal representative of successor in interest may not be invoked by a plaintiff who has kept his action in a semi-dormant condition for a number of years and then called defendant's heir into court after the heir, by elapse of time, is unable to make good his defense or that defense which the ancestor might have made. Sawyer v. Cowell, 241 N. C. 681, 86 S. E. (2d) 431 (1955).

Decedent's Cause of Action Can Be Prosecuted Only by Personal Representative.—A decedent's cause or right of action surviving his death can be continued and prosecuted only by his personal representative. Neal v. Associates Discount Corp., 260 N.C. 771, 133 S.E.2d 699 (1963).

Applied in Everett v. Yopp, 247 N. C. 38, 100 S. E. (2d) 221 (1957).

Cited in McIntyre v. Josey, 239 N. C. 109, 79 S. E. (2d) 202 (1953).

§ 1-75. Procedure on death of party.

Cross Reference.—

See note to § 1-74.

SUBCHAPTER IV. VENUE.

ARTICLE 7.

Venue.

§ 1-76. Where subject of action situated.

I. IN GENERAL.

Applied in Casstevens v. Wilkes Telephone Membership Corp., 254 N. C. 746, 120 S. E. (2d) 94 (1961).

Cited in Evans v. Morrow, 233 N. C. 562, 64 S. E. (2d) 842 (1951).

II. ACTIONS RELATING TO REAL PROPERTY.

Injuries to Land.—

Action to recover damages to real property is transitory. Wheatley v. Phillips, 228 F. Supp. 439 (W.D.N.C. 1964).

Action for Damages for Breach of Contract.—Where the plaintiff in his complaint does not undertake to allege facts to support a decree for specific performance, but on the contrary bottoms his action on the breach of the contract, and seeks to recover damages resulting therefrom, such an action is not for the recovery of real property or any interest there-

in as contemplated by this section. Lamb v. Staples, 234 N. C. 166, 66 S. E. (2d) 660 (1951).

Action to Enforce Contract Rights under Lease.—Where plaintiff brought an action to obtain a decree in personam to enforce contractual rights under a lease, and judgment would not alter the terms of the lease, require notice to third parties, or affect title to the land, the defendant's motion to remove as a matter of right to the county in which the land is situate was properly denied. Rose's Stores, Inc. v. Tarrytown Center, Inc., 270 N.C. 201, 154 S.E.2d 313 (1967).

Venue of action against regional housing authority to determine respective rights of parties in certain land is properly the county in which the realty is situated and in which the authority has express power to act, notwithstanding that the principal office of the authority is in another county. Powell v. Eastern Carolina Regional Housing Authority, 251 N. C. 812, 112 S. E. (2d) 386 (1960).

Removal of Action, etc.—

When the title to real estate may be affected by an action, the action is local and removable to the county where the land is situate by proper motion made in apt time. Rose's Stores, Inc. v. Tarrytown Center, Inc., 270 N.C. 201, 154 S.E.2d 313 (1967).

V. RECOVERY OF PERSONAL PROPERTY.

Removal for Convenience of Witnesses.—Once a cause involving recovery of personal property is properly instituted, this section does not prevent the seeking of a removal for the convenience of witnesses, and whether the motion to remove should be granted is a matter in the discretion of the court. Moody v. Warren-Robbins, Inc., 251 N. C. 172, 110 S. E. (2d) 866 (1959).

Applied in Dubose v. Harpe, 239 N. C. 672, 80 S. E. (2d) 454 (1954).

§ 1-77. Where cause of action arose.

Any consideration of subdivision (2) involves two questions: (1) Is defendant a "public officer or person especially appointed to execute his duties"? (2) In what county did the cause of action in suit arise? Coats v. Sampson County Memorial Hosp., Inc., 264 N.C. 332, 141 S.E.2d 490 (1965).

Officers of Counties and Cities.—

Actions against counties must be brought in the county sued. Coats v. Sampson County Memorial Hosp., Inc., 264 N.C. 332, 141 S.E.2d 490 (1965).

Action against Municipality Is Action against Public Officer.—

In accord with original. See Lee v. Poston, 233 N. C. 546, 64 S. E. (2d) 835 (1951).

County Hospital Held An Agency of the County.—See Coats v. Sampson County Memorial Hosp., Inc., 264 N.C. 332, 141 S.E.2d 490 (1965).

Section Not Applicable to Religious Corporation.—See Lee v. Poston, 233 N. C. 546, 64 S. E. (2d) 835 (1951).

Injurious Results Taking Effect in Another County.—Where the cause of an alleged grievance is situate or exists in one state or county, and the injurious results take effect in another, the courts of the former have jurisdiction. Powell v. Eastern Carolina Regional Housing Authority, 251 N. C. 812, 112 S. E. (2d) 386 (1960).

§ 1-78. Official bonds executors and administrators.

The proper venue for actions against executors and administrators is the county in which they qualify. Lichtenfels v. North Carolina Nat'l Bank, 260 N.C. 146, 132 S.E.2d 360 (1963).

Section Includes Guardians.—This section has been held to include guardians notwithstanding the only words used are "executors" and "administrators." Lichtenfels v. North Carolina Nat'l Bank 260 N.C. 146, 132 S.E.2d 360 (1963), citing State ex rel. Cloman v. Staton, 78 N.C. 235 (1878).

And All Court-Appointed Fiduciaries Required to Account to Court Appointing Them.—This section is limited to actions against executors and administrators; but there can be no doubt that the legislature intended the words used to encompass all fiduciaries, irrespective of technical titles, who act by reason of a court appointment and are by law required to account to the court appointing them. Lichtenfels v. North Carolina Nat'l Bank, 260 N.C. 146, 132 S.E.2d 360 (1963).

Representative Is Not Entitled to Removal If Not Sued in His Official Capacity.—The fact that an executor or administrator is sued and the defendant is named as such executor or administrator in the summons caption and complaint, does not entitle such defendant to an order of re-

moval to the county in which he qualified if the complaint discloses the alleged cause of action is not against such executor or administrator in his official capacity. Davis v. Singleton, 256 N. C. 596, 124 S. E. (2d) 563 (1962).

When Action Is against Representative in Official Capacity.—An action is against the representative in his official capacity if it: (a) Asserts a claim against the estate; (b) involves the settlement of his accounts; or (c) involves the distribution of the estate. Davis v. Singleton, 256 N. C. 596, 124 S. E. (2d) 563 (1962).

"Instituted."—

This section applies to original actions "instituted," i. e., originally commenced, against personal representatives, and not to actions already pending in which it may be proper or necessary to make them parties. Evans v. Morrow, 233 N. C. 562, 64 S. E. (2d) 842 (1951).

A national bank, by qualifying as a testamentary trustee, waives any right to have an action for an accounting, instituted against it in the county in which the will was probated, removed to the county in which it maintains its principal office. Lichtenfels v. North Carolina Nat'l Bank, 260 N.C. 146, 132 S.E.2d 360 (1963).

Cited in Evans v. Morrow, 234 N. C. 600, 68 S. E. (2d) 258 (1951); Nello L. Teer Co. v. Hitchcock Corp., 235 N. C. 741, 71 S. E. (2d) 54 (1952).

§ 1-79. Domestic corporations.—For the purpose of suing and being sued, the residence of a domestic corporation is as follows:

(1) Where the registered office of the corporation is located.

(2) If the corporation having been formed prior to July 1, 1957 does not have a registered office in this State, but does have a principal office in this State, its residence is in the county where such principal office is said to be located by its certificate of incorporation, or amendment thereto, or legislative charter. (1903, c. 806; Rev., s. 422; C. S., s. 466; 1951, c. 837, s. 5; 1957, c. 492.)

Editor's Note.—

The 1957 amendment rewrote this section.

"Principal Office."—

The words "principal place of business," formerly used in this section are regarded as synonymous with the words "principal office" as used in § 55-2, requiring the location of the principal office in this State to be set forth in the certificate of incorporation by which the corporation is formed. Howle v. Twin States Express, Inc., 237 N. C. 667, 75 S. E. (2d) 732 (1953); Crain & Denbo, Inc. v. Harris & Harris Constr. Co., 250 N. C. 106, 108 S. E. (2d) 122 (1959).

Section Does Not Apply to Foreign Insurance Companies.—While statutes relating to suits in behalf of or against domestic corporations and foreign corporations which have submitted to domestication must be read in pari materia, the provisions of this section have no application to foreign insurance companies, since § 58-150 does not require a foreign insurance company to file a statement in the office of the Commissioner of Insurance setting forth its principal place of business. Crain & Denbo, Inc. v. Harris & Harris Constr. Co., 250 N. C. 106, 108 S. E. (2d) 122 (1959).

Where findings of fact showed that a foreign insurance company had no registered or principal office located in Wake County, it was not entitled as a matter of right to have an action removed for trial to Wake County by virtue of this section. Crain & Denbo, Inc. v. Harris & Harris Constr. Co., 250 N. C. 106, 108 S. E. (2d) 122 (1959).

Stated in Haworth v. General Motors Accept. Corp., 238 F. (2d) 203 (1956).

§ 1-80. Foreign corporations.

Quoted in Troy Lumber Co. v. State Sewing Machine Corp., 233 N. C. 407, 64 S. E. (2d) 415 (1951).

Cited in Crain & Denbo, Inc. v. Harris & Harris Constr. Co., 250 N. C. 106, 108 S. E. (2d) 122 (1959).

§ 1-82. Venue in all other cases.—In all other cases the action must be tried in the county in which the plaintiffs or the defendants, or any of them, reside at its commencement; or if none of the defendants reside in the State, then in the county in which the plaintiffs, or any of them, reside; and if none of the parties reside in the State, then the action may be tried in any county which the plaintiff designates in his summons and complaint, subject to the power of the

court to change the place of trial, in the cases provided by statute; provided that any person who has resided on or been stationed in a United States army, navy, marine corps, coast guard or air force installation or reservation within this State for a period of one (1) year or more next preceding the institution of an action shall be deemed a resident of the county within which such installation or reservation, or part thereof, is situated and of any county adjacent to such county where such person stationed at such installation or reservation lives in such adjacent county, for the purposes of this section. The term person shall include military personnel and the spouses and dependents of such personnel. (C. C. P., s. 68; 1868-9, cc. 59, 277; Code, s. 192; 1905, c. 367; Rev., s. 424; C. S., s. 469; 1957, c. 1082.)

Editor's Note.—

The 1957 amendment added the proviso and the last sentence.

Action for alimony without divorce under § 50-16 must be tried in the county in which the plaintiff or defendant resided at commencement of suit. Burrell v. Burrell, 243 N. C. 24, 89 S. E. (2d) 732 (1955).

Action by Domesticated Foreign Corporation.—The proper venue for an action instituted by a foreign corporation domesticated in this State is in the county in which it maintains its principal place of business. Aetna Cas. & Sur. Co. v. Petroleum Transit Co., 266 N.C. 756, 147 S.E.2d 229 (1966).

Residence of Foreign Insurance Company.—Where findings of fact showed that a foreign insurance company maintained a supervisory office in Mecklenburg County, and that that office supervised all of the local and special agents and adjusters of the company throughout the State, the findings showed that the insurance company, for purposes of venue, was not a resident of Wake County, within the purview of this section. Crain & Denbo, Inc. v. Harris & Harris Constr. Co., 250 N. C. 106, 108 S. E. (2d) 122 (1959).

Denial of Motion for Removal.—In order to deny a motion for removal to a county which is not a proper venue, it is not required that the trial court determine what is the proper county for the trial. Doss v. Nowell, 268 N.C. 289, 150 S.E.2d 394 (1966).

Where the evidence is sufficient to support the court's findings that plaintiff, a nonresident corporation, had domesticated in this State and had brought the action in the county in which it maintained its principal place of business in North Carolina, denial of defendant's motion for change of venue will not be disturbed. Aetna Cas. & Sur. Co. v. Petroleum Transit Co., 266 N.C. 756, 147 S.E.2d 229 (1966).

Applied in Brendle v. Stafford, 246 N. C. 218, 97 S. E. (2d) 843 (1957).

Cited in Lee v. Poston, 233 N. C. 546, 64 S. E. (2d) 835 (1951).

§ 1-83. Change of venue.

I. IN GENERAL.

Editor's Note.—

For case law survey on venue, see 41 N C. Law Rev. 525.

The word "venue," as used in this section, means place of trial, the place or county where the trial of a cause is to be held. The authority thus vested in the superior court judge to remove a cause instituted in a county which "is not the proper one," as provided by the statute fixing the venue of actions, is the power to change the place of trial. The trial, nonetheless, is to be had in the same court which ordered its removal—the superior court. Lovegrove v. Lovegrove, 237 N. C. 307, 74 S. E. (2d) 723 (1953).

Venue is not jurisdictional, but is only ground for removal to the proper county, if objection thereto is made in apt time and in the proper manner. Nello L. Teer Co. v. Hitchcock Corp., 235 N. C. 741, 71 S. E. (2d) 54 (1952); Casstevens v. Wilkes Telephone Membership Corp., 254 N. C. 746, 120 S. E. (2d) 94 (1961).

Action Instituted in Wrong County Should Be Removed, Not Dismissed.—When an action is instituted in the wrong county, the superior court should, upon apt motion, remove the action, not dismiss it. Coats v. Sampson County Memorial Hosp., Inc., 264 N.C. 332, 141 S.E.2d 490 (1965).

Demand for change of venue must be made by the defendant. Nello L. Teer Co. v. Hitchcock Corp., 235 N. C. 741, 71 S. E. (2d) 54 (1952).

By adding subdivision 4 to this section, the legislature construed the existing statute as not giving a plaintiff the right to have an action voluntarily instituted by him, in an improper county, removed to one of proper venue. Nello L. Teer Co. v.

Hitchcock Corp., 235 N. C. 741, 71 S. E. (2d) 54 (1952).

Denial of Motion for Removal.—In order to deny a motion for removal to a county which is not a proper venue, it is not required that the trial court determine what is the proper county for the trial. Doss v. Nowell, 268 N.C. 289, 150 S.E.2d 394 (1966).

Applied in Davis v. Singleton, 256 N. C. 596, 124 S. E. (2d) 563 (1962); Slater v. Lovick, 257 N. C. 619, 127 S. E. (2d) 273 (1962).

II. THE APPLICATION FOR REMOVAL.

A. Time of Demand.

This section is explicit, etc.

In accord with 1st paragraph in original. See Nello L. Teer Co. v. Hitchcock Corp., 235 N. C. 741, 71 S. E. (2d) 54 (1952)

Before Time for Filing Answer.—

A motion for change of venue made before the time for answer has expired is made in apt time. Rose's Stores, Inc. v. Tarrytown Center, Inc., 270 N.C. 201, 154 S.E.2d 313 (1967).

Demand must be made before the time of answering expires, and before the answer is filed. Nello L. Teer Co. v. Hitchcock Corp., 235 N. C. 741, 71 S. E. (2d) 54 (1952).

C. Form and Contents of Demand.

The demand must be in writing. Nello L. Teer Co. v. Hitchcock Corp., 235 N. C. 741, 71 S. E. (2d) 54 (1952).

III. WAIVER OF RIGHT TO CHANGE.

Effect of Failure to Comply with Section.—

If the county designated for the purpose of summons and complaint is not the proper one, the action may be tried therein unless the defendant, before the time for answering expires, demands in writing that the trial be conducted in the proper county, and the place of trial is thereupon changed by consent of the parties, or by order of the court. Nelms v Nelms, 250 N. C. 237, 108 S. E. (2d) 529 (1959).

Venue, not being jurisdictional, may be waived by any party, including the government. Nello L. Teer Co. v. Hitchcock Corp., 235 N. C. 741, 71 S. E. (2d) 54 (1952).

Filing Answer to Merits.—

In accord with original. See Nello L. Teer Co. v. Hitchcock Corp., 235 N. C. 741, 71 S. E. (2d) 54 (1952).

An Agreement between Counsel, etc.

In accord with original. See Nello L. Teer Co. v. Hitchcock Corp., 235 N. C. 741, 71 S. E. (2d) 54 (1952)

Where plaintiff voluntarily institutes an action in an improper county and files his complaint and obtains service on the defendant, he thereby waives his right to have the action removed to the county of his residence. Nello L. Teer Co. v. Hitchcock Corp., 235 N. C. 741, 71 S. E. (2d) 54 (1952).

IV. APPEAL.

A. Where County Designated Not Proper.

No Discretion in Court.—

If the demand for removal is properly made, and it appears that the action has been brought in the wrong county, the court has no discretion as to removal. It is a right which the defendant may assert and which the court cannot deny, if properly asserted. The word "may" is construed "must", and from a refusal of the right to remove the defendant may appeal. Nello L. Teer Co. v Hitchcock Corp., 235 N. C. 741, 71 S. E. (2d) 54 (1952).

Not Premature.—

An appeal from a ruling on a motion for a change of venue under § 1-77 is not premature. Coats v. Sampson County Memorial Hosp., Inc., 264 N.C. 332, 141 S.E.2d 490 (1965).

B. Convenience of Witnesses and Ends of Justice Promoted.

Discretion of Court.—

In accord with 3rd paragraph in original. See Farmers Cooperative Exchange, Inc. v. Trull, 255 N. C. 202, 120 S. E. (2d) 438 (1961).

§ 1-84. Removal for fair trial.—In all civil and criminal actions in the superior and criminal courts, when it is suggested on oath or affirmation on behalf of the State or the traverser of the bill of indictment, or of the plaintiff or defendant, that there are probable grounds to believe that a fair and impartial trial cannot be obtained in the county in which the action is pending, the judge may order a copy of the record of the action removed to some adjacent county for trial, if he is of the opinion that a fair trial cannot be had in said county, after hearing

all the testimony offered on either side by affidavits: Provided, that when a case has been removed to another county for trial on motion of the solicitor, the defendant may, upon call of the case for trial, object to trial therein and move that the case be sent for trial to some other county adjacent to the county from which removed, and in the event the objection is overruled, the defendant may forthwith appeal to the Supreme Court. If the motion of the defendant is sustained the judge shall order the case tried in some other county adjacent to the county from which the case was first removed. If, upon appeal, the Supreme Court shall find error in the order denying the motion or if it shall suggest that the case probably ought to be removed then, and in such event, it shall be the duty of the judge at the next term of court of the county to which the case was first removed to order the case sent for trial to some other county adjacent to the county where the bill of indictment was found. The county from which the cause is removed must pay to the county in which the cause has been tried the full amount paid by the trial county for jurors' fees, and the full costs in the cause which are not taxable against or cannot be recovered from a party to the action, and for which the trial county is liable. (1806, c. 693, s. 12, P. R.; 1879, c. 45; Code, s. 196; 1899, cc. 104, 508; Rev., s. 426; 1917, c. 44; C. S., s. 471; 1957, c. 601.)

Editor's Note.—

The 1957 amendment inserted the proviso and the second and third sentences.

Discretion, etc.—

A motion for change of venue or, in the alternative, that a jury be summonsed from another county, on the ground that defendant could not obtain a fair trial because of widespread and unfavorable publicity, is addressed to the discretion of the trial court, and where the record discloses that the trial judge conducted a hearing, read all the affidavits, and examined the press releases, that each juror selected stated that he could render a verdict uninfluenced by the publicity, and that defendant did not exhaust his peremptory challenges, abuse of discretion in denying the motion is not disclosed. State v. Porth, 269 N.C. 329, 153 S.E.2d 10 (1967).

Order Tantamount to Denial of Motion to Remove.—When the judge entered an order directing that venire of jurors be drawn from another county to serve as jurors in the trial, it was tantamount to a denial of a motion to remove the cases to another county for trial. State v. Moore, 258 N. C. 300, 128 S. E. (2d) 563 (1962).

Waiver of Rights by Failure to Except or Appeal.—The defendant by failing to except to the judge's denial of the motion for removal and by failing to appeal, waives all rights for removal. State v. Moore, 258 N. C. 300, 128 S. E. (2d) 563 (1962).

Applied in State v. Arnold, 258 N. C. 563, 129 S. E. (2d) 229 (1963).

Cited in State v. Perry, 248 N. C. 334, 103 S. E. (2d) 404 (1958); State v. Perry, 250 N. C. 119, 108 S. E. (2d) 447 (1959).

§ 1-85. Affidavits on hearing for removal; when removal ordered.

Affidavit Must Set Forth Ground of Application.—The rule with respect to removal upon the grounds that the defendant cannot get a fair trial in the county where the action is pending contemplates that affidavits for the removal must "set forth particularly in detail the ground of the application." State v. Moore, 258 N. C. 300, 128 S. E. (2d) 563 (1962).

§ 1-86: Repealed by Session Laws 1967, c. 218, s. 4.

Cross Reference.—

For present provisions as to supplemental jurors from other counties, see § 9-12.

§ 1-87 Transcript of removal; subsequent proceedings.

Time to Deposit.—

Where the order of removal is by consent and no time is limited in the order of removal, the parties, or either of them, should have a reasonable time in which to deposit the transcript in the other court. Jones v. Brinson, 238 N. C. 506, 78 S. E. (2d) 334 (1953).

Jurisdiction during Interval Allowed for Perfecting Removal.—During the interval allowed for perfecting the order of removal, jurisdiction cannot exist simultaneously in both courts, unless, as permitted by this section, it is "otherwise provided by the consent of the parties in writing duly filed, or by order of court."

And there is the further exception that, by virtue of § 8-62, subpoenas for witnesses and commissions to take depositions may issue from either court during the interval between the entry of the order of removal and the filing of the transcript in the court to which removal is ordered. Subject to these exceptions, when jurisdiction of the court to which the cause is removed attaches, the court of original venue eo instante loses jurisdiction. And it is a fair interpretation of this section that until the transcript is filed in the court to which removal is ordered, it does not acquire jurisdiction over the cause. Jones v. Brinson, 238 N. C. 506, 78 S. E. (2d) 334 (1953).

Effect of Failure to File Transcript within Time Allowed.—In the event the transcript of removal is not filed within the time limited by the court, or within a reasonable time after the order of removal is entered where no time for removal is fixed, the dormant jurisdiction of the court of original venue, on proper notice, may be reactivated for exclusive control over the cause. Jones v. Brinson, 238 N. C. 506, 78 S. E. (2d) 334 (1953); Farmers Cooperative Exchange, Inc. v. Trull, 255 N. C. 202, 120 S. E. (2d) 438 (1961).

When neither party has taken steps to perfect the removal of the cause, either party has the right to move the lower court for a reactivation of its jurisdiction, and have it determine, on notice to the other party, whether the order of removal should be rescinded as upon abandonment of the right of removal. Jones v. Brinson, 238 N. C. 506, 78 S. E. (2d) 334 (1953).

Failure to Transmit Copy of Entire Record.—It is not absolutely essential to the acquirement of jurisdiction by the court to which the venue is changed that a copy of the entire record be transmitted. It would seem to be sufficient to bring its power of jurisdiction into exercise if enough is transmitted to enable the court to determine what is in controversy and what is to be adjudicated by it. Once this is done, defects may be cured, if need be, by certiorari, upon suggestion of a diminution of the record. Meanwhile, the jurisdiction of the court of original venue becomes dormant, and that court is functus officio to deal with the substantive rights of the parties during the interval allowable for the filing of the transcript in the court to which the case is ordered removed. Jones v. Brinson, 238 N. C. 506, 78 S. E. (2d) 334 (1953).

§ 1-87.1. Dismissal of action arising out of State when parties are nonresidents.

Editor's Note.—

For a note on forum non conveniens and conflict of laws in North Carolina, see 45 N.C.L. Rev. 717 (1967).

Applied in Hutchins v. Day, 269 N.C. 607, 153 S.E.2d 132 (1967).

SUBCHAPTER V. COMMENCEMENT OF ACTIONS.

ARTICLE 8.

Summons.

§ 1-88. Civil actions; how commenced.

Editor's Note.—

For case law survey on trial practice, see 43 N.C.L. Rev. 938 (1965).

Necessity for Service of Process.—

Service of summons, unless waived, is a jurisdictional requirement. Kleinfeldt v. Shoney's of Charlotte, Inc., 257 N. C. 791, 127 S. E. (2d) 573 (1962)

Motion to Set Aside Default Judgment for Want of Service.—A meritorious defense is not essential or relevant on a motion to set aside a default judgment for want of jurisdiction by reason of want of service of summons. Kleinfeldt v. Shoney's of Charlotte, Inc., 257 N. C. 791, 127 S. E. (2d) 573 (1962).

Applied in In re Rober's Co., 258 N. C. 184, 128 S. E. (2d) 137 (1962).

Stated in Thrush v Thrush, 246 N. C. 114, 97 S. E. (2d) 472 (1957); Carolina Plywood Distribs., Inc. v. McAndrews, 270 N.C. 91, 153 S.E.2d 770 (1967).

Cited in Burlington City Board of Education v. Allen, 243 N. C. 520, 91 S. E. (2d) 180 (1956); Morton v. Blue Ridge Ins. Co., 250 N. C. 722, 110 S. E. (2d) 330 (1959).

§ 1-88.1. When summons issued.

Where process issued to the sheriff of one county is returned without any notation thereon but with an accompanying letter stating that the defendant named is in another county, the act of the clerk in marking through the name of the first county and writing above it the name of the second county, so that the process is directed to the sheriff of the second county, amounts to the issuance of new process and institutes a new action as of the date of the later issuance, and service by the sheriff of the second county meets all the requirements of the law. Morton v. Blue Ridge Ins. Co., 250 N. C. 722, 110 S. E. (2d) 330 (1959).

§ 1-89. **Contents, return, seal.**—The summons must run in the name of the State, be signed by the clerk or deputy clerks of the superior court having jurisdiction to try the action, and be directed to the sheriff or other proper officers of the county or counties in which the defendants or any of them reside or may be found. It must be returnable before the clerk and must command the sheriff or other proper officer to summon the defendant, or defendants, to appear and answer the complaint of the plaintiff within thirty (30) days after its service upon defendant, or defendants; and must contain a notice stating in substance that if the defendant or defendants fail to answer the complaint within the time specified the plaintiff will apply to the court for the relief demanded in the complaint; and must be dated on the date of its issue. Every summons addressed to the sheriff or other officer of a county, other than that from which it issued, must be attested by the seal of the court; but when addressed to the sheriff or other officer of the county in which it issued, such seal is unnecessary. Summons must be served by the sheriff to whom it is addressed for service within twenty (20) days after the date of its issue; and upon serving the same, the officer shall note in writing upon the copy thereof, delivered to the defendant, the date of service, but failure to comply with this requirement shall not invalidate the service, and, if not served within twenty (20) days after the date of its issue upon every defendant, must be returned by the officer holding the same for service, to the clerk of the court issuing the summons, with notation thereon of its non-service and the reasons therefor as to every defendant not served. In all cases where service of summons is made by publication, such service by publication shall be completed within fifty days from the order of publication. Provided, that in all actions for tax foreclosures, street assessment foreclosures and sidewalk assessment foreclosures, summons must be served by the sheriff to whom it is addressed for service within sixty (60) days after the date of its issue; and upon serving the same the officer shall note in writing upon the copy thereof, delivered to the defendant, the date of service, but failure to comply with this requirement shall not invalidate the service, and, if not served within sixty (60) days after the date of its issue upon every defendant, must be returned by the officer holding the same for service, to the clerk of the court issuing the summons, with notation thereon of its non-service and the reasons therefor as to every defendant not served. Whenever a summons is issued for service under the provisions of § 1-104 it may be served by the sheriff or other process officer of the county and state where the defendant resides at any time within thirty (30) days after the date of its issue.

Provided, that all summonses issued in civil actions commenced prior to March 24, 1953, in the superior courts, which were signed by a deputy clerk, be and the same are hereby in all respects approved and validated. (C. C. P., s. 74; 1876-7, cc. 85, 241; Code, ss. 200, 203, 213; Rev., ss. 430, 431; 1919, c. 304, s. 1; C. S., s. 476, Ex. Sess., 1920, c. 96, s. 1; Ex. Sess., 1921, c. 92, s. 1; 1927, c. 66, s. 1; 1927, c. 132; 1929, c. 237, s. 1; 1935, c. 343; 1939, c. 15; 1945, c. 664; 1953, c. 441; 1953, c. 1143, s. 1.)

Editor's Note.—
The first 1953 amendment inserted the words "or deputy clerks" in the first sentence and added the second paragraph.

The second 1953 amendment increased from ten to twenty days the time within which the summons must be served.

For brief comment on the first 1953 amendment, see 31 N. C. Law Rev. 388.

Section 1-105 and this section must be construed together. Carolina Plywood Distribs., Inc. v. McAndrews, 270 N.C. 91, 153 S.E.2d 770 (1967).

And the provisions of both sections must be strictly complied with. Carolina Plywood Distribs., Inc. v. McAndrews, 270 N.C. 91, 153 S.E.2d 770 (1967).

The issuance of a valid summons as provided in this section is necessary for there to be compliance with the provisions of § 1-105. Carolina Plywood Distribs., Inc. v. McAndrews, 270 N.C. 91, 153 S.E.2d 770 (1967).

Purpose of Service of Summons.—The purpose of service of summons is to give notice to the party against whom the proceedings or action is commenced, and any notification which reasonably accomplishes that purpose answers the claims of law and justice. Morton v. Blue Ridge Ins. Co., 250 N. C. 722, 110 S. E. (2d) 330 (1959), citing Jester v. Baltimore Steam Packet Co., 131 N. C. 54, 42 S. E. 447 (1902).

Summons Loses Vitality if Not Served within Prescribed Time.—

The service of summons after the date fixed for its return, there being no endorsement by the clerk extending the time for service, is a nullity. Webb v. Seaboard Air Line R.R., 268 N.C. 552, 151 S.E.2d 19 (1966).

Under this section, prior to the 1939 amendment, the service of summons more than ten days after its issuance in tax foreclosure proceedings, without any alias or pluries summons, was tantamount to nonservice, since the summons had lost its validity at the time of service. Columbus County v. Thompson, 249 N. C. 607, 107 S. E. (2d) 302 (1959).

Prerequisites to Extension of Time for Service.—In order for a plaintiff to be entitled to the procurement of an extension of time to serve summons, it is contemplated by the statutes and decisions of this State that the summons, as originally issued or extended by order of the clerk, must be served by the sheriff to whom it is addressed for service within the time provided therein, and if not served within that time, such summons must be returned by the officer holding the same for service to the clerk of the county issuing the summons, with notation thereon of its nonservice and the reasons therefor as to any defendant not served. Deaton v. Thomas, 262 N.C. 565, 138 S.E.2d 201 (1964).

Summons Never Delivered to Officer Cannot Be Used as Basis for Extension of Time.—Where a summons is issued by a clerk of the superior court and such summons is never delivered to the officer to whom it is directed for service, after the time for service has been extended, such summons may not be used as a basis for the issuance of an alias process or the extension of time for service. Deaton v. Thomas, 262 N.C. 565, 138 S.E.2d 201 (1964).

The issuance of a summons is not a judicial act which must be performed by the clerk in person, but rather it is a ministerial act which may be done in his name by a deputy. Beck v. Voncannon, 237 N. C. 707, 75 S. E. (2d) 895 (1953).

When Summons Sufficient to Confer Jurisdiction. — To confer jurisdiction, the process relied on must in fact issue from the court and show upon its face that it emanated therefrom and was intended to bring the defendant into court to answer the complaint of the plaintiff. And when this is clearly shown by evidence appearing on the face of the summons, ordinarily the writ will be deemed sufficient to meet the requirements of due process and bring the party served into court, and formal defects appearing on the face of the record will be treated as nonjurisdictional irregularities, subject to amendment. If, however, there is nothing upon the face of the paper which stamps upon it unmistakably an official character, it is not a defective summons but no summons at all. Beck v. Voncannon, 237 N. C. 707, 75 S. E. (2d) 895 (1953).

Sufficiency of Alias or Pluries Summons.—Where there is nothing upon a paper writing to indicate that it is an alias or pluries summons or that it related to any original process, such paper writing, even though sufficient to constitute an original summons, cannot constitute an alias or pluries summons. Webb v. Seaboard Air Line R.R., 268 N.C. 552, 151 S.E.2d 19 (1966).

Signature of Sheriff.—

Where process issued to the sheriff of one county is returned and the clerk strikes through the name of the county and inserts the name of a second county, so that the process is directed to the sheriff of the second county, the fact that the sheriff of the second county signs it at the place for the signature of the sheriff of the first county is immaterial, it appearing from the affidavit of the clerk that the summons was served by the sheriff of the second county, and further, the court will take judicial notice of the person who is

the sheriff of the county. Morton v. Blue Ridge Ins. Co., 250 N. C. 722, 110 S. E. (2d) 330 (1959).

Want of Signature of Clerk Does Not Render Summons Fatally Defective.—The want of a signature of the clerk on a summons otherwise complete with seal does not render the summons fatally defective and ineffectual to confer jurisdiction, but merely irregular and subject to amendment; for any defect or omission of a formal character which would be waived or remedied by a general appearance or an answer upon the merits, may be treated as a matter which can be remedied by amendment. The imprint of the seal furnishes internal evidence of the official origin of the summons. Beck v. Voncannon, 237 N. C. 707, 75 S. E. (2d) 895 (1953).

Summons Signed by Deputy.—Where a summons, otherwise complete and regular, was signed by the deputy clerk and thereupon served, the summons was not void. The failure of the deputy to sign the name of his principal was a nonjurisdictional irregularity. Beck v. Voncannon, 237 N. C. 707, 75 S. E. (2d) 895 (1953), decided under this section as it stood before the first 1953 amendment.

Sufficiency of Service.—Where, apparently through inadvertence, the order for service of process upon a nonresident motorist under § 1-105 was directed to the sheriff of one county, but was forwarded by the plaintiff's attorneys to the sheriff of another county and by him served upon the Commissioner of Motor Vehicles, service was insufficient, notwithstanding that notice of service of process upon the Commissioner and a copy thereof did reach the defendant by registered mail as required by § 1-105 (2). Byrd v. Pawlick, 362 F.2d 390 (4th Cir. 1966).

Service by Rural Policeman for Sheriff.—Griffin v. Barnes, 242 N. C. 306, 87 S. E. (2d) 560 (1955).

Applied in Russell v. Bea Staple Mfg. Co., 266 N.C. 531, 146 S.E.2d 459 (1966).

Stated in Troy Lumber Co. v. State Sewing Machine Corp., 233 N. C. 407, 64 S. E. (2d) 415 (1951).

Cited in Pate v. R. L. Pittman Hospital, Inc., 234 N. C. 637, 68 S. E. (2d) 288 (1951); Boone v. Sparrow, 235 N. C. 396, 70 S. E. (2d) 204 (1952); Collins v. Simms, 254 N. C. 148, 118 S. E. (2d) 402 (1961).

§ 1-93. Amount requisite for summons to run outside of county.—No summons in civil suits or civil proceedings shall run outside the county where issued, unless the amount involved in the litigation is more than two hundred dollars in matters arising out of contract and more than fifty dollars in matters arising in tort. Provided, that this section shall not affect or limit the provisions of §§ 7-138, 7-140 to 7-143, and provided further that this section shall not be applicable to suits for the collection of taxes and foreclosure of tax liens pursuant to the provisions of article 27 of chapter 105 of the General Statutes or other actions or proceedings of which the superior court has exclusive, original jurisdiction. (1939, c. 81; 1955, c. 39.)

Local Modification.—Franklin (recorder's court): 1953, c. 218, s. 3.

Editor's Note. — The 1955 amendment expressly excluded suits for the collection of taxes and the foreclosure of tax liens.

§ 1-94. When officer must execute and return.

Cross References.—

As to setting aside default judgment for nonservice of summons, see note to § 1-211. As to evidence of nonservice, see note to § 1-592.

Delivery of Summons to Defendants.—Delivery of copy of summons and the complaint to the male defendant with instructions to him to deliver it to the feme defendant, his wife, is not valid service on the feme. Harrington v. Rice, 245 N. C. 640, 97 S. E. (2d) 239 (1957).

Quoted in part in Troy Lumber Co v. State Sewing Machine Corp., 233 N. C. 407, 64 S. E. (2d) 415 (1951)

Cited in Collins v. Simms, 254 N. C. 148, 118 S. E. (2d) 402 (1961).

§ 1-95. Extension of life of summons.—When the defendant in a civil action or a special proceeding is not served with summons within the time allowed for its service, it shall not be necessary to have new process issued. At any time within ninety days after issue of the summons, or after the date of the last prior endorsement, the clerk, upon request of the plaintiff shall endorse upon the original summons an extension of time within which to serve it. The ex-

tension shall be for the same number of days, from the date of such endorsement, as were originally allowed for service. In tax and assessment foreclosures brought under § 105-391 or § 105-414 the first endorsement may be made at any time within two years after issue of the summons, and subsequent endorsements may thereafter be made as in other actions.

As an alternate method of extending the life of a summons in those cases where the defendant in a civil action or special proceeding is not served with summons within twenty days, the plaintiff may sue out an alias or pluries summons, returnable in the same manner as original process. An alias or pluries summons may be sued out at any time within ninety days after the date of issue of the next preceding summons in the chain of summonses. Provided, however, that in case of tax suits and special assessment foreclosure suits brought under the provisions of § 105-391 and § 105-414 as amended, an alias or pluries summons may be sued out at any time within two years after the issuance of the original summons, whether any intervening alias or pluries summons has heretofore been issued or not, and after the issuance of such alias or pluries summons, the chain of summonses may be kept up as in any other action. (1777, c. 115, ss. 23, 71, P. R.; R. C., c. 31, s. 52, Code, s. 205; Rev., s. 437; C. S., s. 480; 1929, c. 237, s. 2; 1931, c. 264; 1945, c. 163; 1953, c. 176, s. 1; 1953, c. 1143, s. 2, 1955, c. 45, s. 1.)

Editor's Note.—

This section was amended twice by the 1953 Session Laws. Chapter 176, effective July 1, 1953, rewrote the section and omitted any reference to an alias or pluries summons. Chapter 1143, enacted subsequently and effective April 29, 1953, ignored Chapter 176 and amended the section as it appears in the original volume by changing the time mentioned in the first sentence from "ten days" to "twenty days." The section set out above is the one enacted by Chapter 176. For brief comment on the 1953 amendments, see 31 N. C. Law Rev. 389.

The 1955 amendment, made applicable to pending litigation, added the second paragraph.

For comment on the 1955 amendment, see 33 N. C. Law Rev. 529.

Summons Served Late without Extension Is Nullity.—The service of summons after date fixed for its return, there being no endorsement by the clerk extending the time for service, is a nullity. Webb v. Seaboard Air Line R.R., 268 N.C. 552, 151 S.E.2d 19 (1966).

Purpose of Keeping up Chain of Summonses.—The real purpose of the provisions of law with respect to keeping up the chain of summonses is to maintain the original date of the commencement of the action where the suit may be affected by the running of a statute of limitations, the pendency of another action or the time limit of an enabling act. Morton v. Blue Ridge Ins. Co., 250 N. C. 722, 110 S. E. (2d) 330 (1959).

Issuance of Alias and Pluries Summons Keeps Cause of Action Alive.—In a civil action or special proceeding where a defendant has not been served with the original summons, the proper issuance of alias and pluries summons under "the alternate method" prescribed by the provisions of this section keeps the cause of action alive, and prevents its discontinuance. Sizemore v. Maroney, 263 N.C. 14, 138 S.E.2d 803 (1964).

An alias summons issues only when the original summons has not been served upon a party defendant named therein. Cherry v. Woolard, 244 N. C. 603, 94 S. E. (2d) 562 (1956).

Sufficiency of Alias or Pluries Summons.—Where there is nothing upon a paper writing to indicate that it is an alias or pluries summons or that it related to any original process, such paper writing, even though sufficient to constitute an original summons, cannot constitute an alias or pluries summons. Webb v. Seaboard Air Line R.R., 268 N.C. 552, 151 S.E.2d 19 (1966).

Service on Additional Party.—This section relates solely to the maintenance of chain of process against an original defendant not properly served, and has no application to the service of process upon an additional party after service has been had on the original defendant. Cherry v. Woolard, 244 N. C. 603, 94 S. E. (2d) 562 (1956).

Summons Never Delivered to Officer to Whom Directed. — Where a summons is issued by a clerk of the superior court and such summons is never delivered to the officer to whom it is directed for service, after the time for service has been extended, such summons may not be used as a basis for the issuance of an alias process or the extension of time for service. Deaton

v. Thomas, 262 N.C. 565, 138 S.E.2d 201 (1964).

Stated in Murphy v. Murphy, 261 N.C. 95, 134 S.E.2d 148 (1964).

Cited in Byrd v. Pawlick, 362 F.2d 390 (4th Cir. 1966).

§ 1-96. Discontinuance.—When there is neither endorsement by the clerk nor issue of alias or pluries summons within the time specified in G. S. 1-95, the action is discontinued as to any defendant not theretofore served with summons. Thereafter, alias or pluries summons may issue, or an extension be endorsed by the clerk, but, as to such defendant, the action shall be deemed to have begun on the date of such issue or endorsement. (Rev., s. 438; C. S., s. 481; 1953, c. 176, s. 3; 1955, c. 45, s. 2; 1959, c. 1161, s. 6.)

Editor's Note. — The 1953 amendment, effective July 1, 1953, rewrote this section. For brief comment on the 1953 amendment, see 31 N. C. Law Rev. 389.

The 1955 amendment, made applicable to pending litigation, inserted the words and punctuation "or failure to keep the chain of summonses issued against a party, but not served,". For comment on the 1955 amendment, see 33 N. C. Law Rev. 529.

The 1959 amendment rewrote this section.

Effect of Substituting Counties in Original Summons. — Substituting "Mecklenburg" for "Cleveland" County in the original summons and sending such summons to the sheriff of Mecklenburg County works a discontinuance of the action commenced by issuance of summons to Cleveland County. Morton v. Blue Ridge Ins. Co., 250 N. C. 722, 110 S. E. (2d) 330 (1959).

Applied in Sizemore v. Maroney, 263 N.C. 14, 138 S.E.2d 803 (1964).

§ 1-97. Service by copy.

1. (a) If the action is against a domestic corporation, to the president, vice president, secretary, assistant secretary, treasurer, assistant treasurer, cashier, assistant cashier, or any manager or person in charge of any office or plant maintained by the corporation;

(b) If the action is against a foreign corporation, to the president, vice president, secretary, assistant secretary, treasurer, or assistant treasurer or the manager of any office or plant maintained in this State by the corporation or to any managing agent transacting business for the corporation in the State or to a director when he is in this State on business of the corporation.

(c) In addition, where the action is against a corporation, domestic or foreign, to the persons and in the manner provided in the Business Corporation Act, or in cases where it is applicable the Non-Profit Corporation Act.

2. If against a minor under the age of fourteen years to the minor personally, and also to his father, mother or guardian, or if there are none within the State, to any person having the care and control of the minor, or with whom he resides, or in whose service he is employed, provided, that where service of summons is to be made upon a minor under the age of fourteen years who has a general guardian, it shall not be necessary for the summons to be delivered to the minor personally if summons is served upon his general guardian.

4. Repealed by Session Laws 1955, c. 545 s. 1.

(1955, c. 241; c. 545, s. 1; c. 1346.)

I. IN GENERAL.

Editor's Note.—The first 1955 amendment added the proviso to subsection 2. The second 1955 amendment, effective July 1, 1955, repealed subsection 4. The third 1955 amendment, effective July 1, 1957, rewrote subsection 1. As the rest of the section was not changed only subsections 1, 2 and 4 are set out or referred to.

Cited in Pate v. R. L. Pittman Hospital, Inc., 234 N. C. 637, 68 S. E. (2d) 288 (1951).

II. SERVICE ON CORPORATIONS.

A. Corporations Generally.

Subsection (1) of this section applies exclusively to service of process in actions against corporations. Melton v. Hill, 251 N. C. 134, 110 S. E. (2d) 875 (1959).

Local Agent.—

In accord with 3rd paragraph in original. See Troy Lumber Co. v. State Sewing Machine Corp., 233 N. C. 407, 64 S. E. (2d) 415 (1951).

In defining the term "agent" it is not the descriptive name employed, but the nature of the business and the extent of the authority given and exercised which is determinative, and the word does not properly extend to a subordinate employee without discretion, but must be one regularly employed, having some charge or measure of control over the business entrusted to him, or of some feature of it, and of sufficient character and rank as to afford reasonable assurance that he will communicate to his company the fact that process has been served upon him. Troy Lumber Co. v. State Sewing Machine Corp., 233 N. C. 407, 64 S. E. (2d) 415 (1951).

Service on Managing Officer Is Valid.—Service of process on a named corporation by delivering a copy of the summons to its managing officer is valid service. Tyndall v. Triangle Mobile Homes, Inc., 264 N.C. 467, 142 S.E.2d 21 (1965).

The general manager of a corporation is within the class named in subsection 1. Tyndall v. Triangle Mobile Homes, Inc., 264 N.C. 467, 142 S.E.2d 21 (1965).

B. Foreign Corporations.

Editor's Note.—For note on "corporate presence" for the purpose of service upon foreign corporations, see 30 N. C. Law Rev. 454.

In General.—

In accord with 1st paragraph in original. See Babb v. Cordell Industries, 242 N. C. 286, 87 S. E. (2d) 513 (1955).

Two Requisites to Jurisdiction.—Where no property is seized or attached, there are two requisites to jurisdiction of a court of the State over a foreign corporation: (1) the corporation must be doing business in the State, and (2) it must be present in the State in the person of an authorized officer or agent. Lambert v. Schell, 235 N. C. 21, 69 S. E. (2d) 11 (1952)

When Corporation Can Be "Found" within State.—A nonresident corporation cannot be served with process unless it can be "found" within the State, and it may be found within the State only when it is engaged in exercising in this State some of the functions for which the corporation was created, which are not purely incidental to the powers granted. Lambert v Schell, 235 N. C. 21, 69 S. E. (2d) 11 (1952).

Doing Business in State.—Doing business in this State means doing some of the things or exercising some of the functions in this State for which the corporation was created. And the business done by it here must be of such nature and character as to warrant the inference that the corporation has subjected itself to the local jurisdiction and is, by its duly authorized officers and agents, present within the State. Lambert v. Schell, 235 N. C. 21, 69 S. E. (2d) 11 (1952).

Evidence held sufficient to sustain the lower court's findings that a nonresident railroad company was doing business in this State although it maintained no trackage here. Dumas v. Chesapeake & O. R. Co., 253 N. C. 501, 117 S. E. (2d) 426 (1960), citing and distinguishing Lambert v. Schell, 235 N. C. 21, 69 S. E. (2d) 11 (1952).

An attempted service on the Secretary of State in an action arising outside the State against a foreign corporation which did business in the State but which did not own property in the State was a nullity. Babb v. Cordell Industries, 242 N. C. 286, 87 S. E. (2d) 513 (1955).

Soliciting in a state by a foreign common carrier of the business of transporting persons and property between the states is not the doing or transaction of business within the state so as to bring the corporation within the jurisdiction of the local courts in an action in personam, at least where such foreign railroad corporation has no line in the state and does no business there other than soliciting business for interstate commerce, even though it maintains an office and employs an agent within the state, because this is merely incidental to the main business of the corporation. Lambert v. Schell, 235 N. C. 21, 69 S. E. (2d) 11 (1952).

A local agency for a foreign corporation, etc.—

A local agent is one who stands in the shoes of the corporation in relation to the particular matters committed to his care. He must be one who derives authority from his principal to act in a representative capacity, and who may be properly termed a representative of the foreign corporation. He must have the power to represent the foreign corporation in the transaction of some part of the business contemplated by its charter, and he must represent the corporation in its business in either a general or limited capacity. Thus the question is to be determined from the nature of the business and the extent of the authority given and exercised. Lambert v. Schell, 235 N. C. 21, 69 S. E. (2d) 11 (1952).

An agent of a foreign corporation upon whom service of process may be had is one who exercises some control over and discretionary power in respect to the cor-

porate functions of the company. Lambert v. Schell, 235 N. C. 21, 69 S. E. (2d) 11 (1952).

Where the agent of a corporate carrier was not authorized to issue a bill of lading or sell a ticket or route a shipment or do anything else that constitutes a part of the usual and ordinary business of the common carrier, and the carrier had no part of its railroad in this State and was engaged in no business here which required or necessitated any such activity on the part of any of its agents, but the duty assigned to him was to induce local shippers to request that their shipments to and from the Pacific Northwest be so routed that the carrier would constitute one of the connecting carriers, the corporate defendant was not doing business or maintaining a local agent within this State so as to render it amenable to process. Lambert v. Schell, 235 N. C. 21, 69 S. E. (2d) 11 (1952).

A suit by a nonresident against a foreign corporation on a cause of action arising outside this State can be maintained in North Carolina, but to bring the foreign corporation into court the service of process must be made upon an officer or agent as defined in this section, and in the following cases only: (1) Where it has property in this State; or (2) where the cause of action arose in this State; or (3) where the service can be made personally upon some officer designated in this section. Atlantic Coast Line R.R. v. J. B. Hunt & Sons, 260 N.C. 717, 133 S.E.2d 644 (1963).

If Personal Service Is Made on Actual Agent in State.—A suit on a cause of action arising out of North Carolina may be maintained in North Carolina against an undomesticated foreign corporation if personal service can be had within the State upon an actual agent of the corporation as defined by this section. Atlantic Coast Line R.R. v. J. P. Hunt & Sons, 260 N.C. 717, 133 S.E.2d 644 (1963).

Service of process made upon a statutory agent, instead of upon an actual agent as required by this section, is a nullity. Atlantic Coast Line R.R. v. J. B. Hunt & Sons, 260 N.C. 717, 133 S.E.2d 644 (1963).

Applied in Harris v. Deere & Co., 128 F. Supp. 799 (1955), aff'd in 223 F. (2d) 161 (1955).

V. SERVICE ON UNINCORPORATED ASSOCIATION OR ORGANIZATION.

Section applies, without distinction, to both resident and nonresident unincorporated associations. Melton v. Hill, 251 N. C. 134, 110 S. E. (2d) 875 (1959).

Unincorporated Association Made Suable as Separate Entity.—When this section is read aright, it does these things: (1) It provides that any unincorporated association or organization, whether resident or nonresident, which is doing business in North Carolina by performing any of the acts for which it is formed, is subject to suit as a separate legal entity; and (2) it prescribes the manner in which service of process is to be made upon such association or organization when it is so sued. It necessarily follows that an unincorporated labor union, whether resident or nonresident, which is doing business in this State by performing any of the acts for which it is formed, is suable as a separate legal entity. Stafford v. Wood, 234 N. C. 622, 68 S. E. (2d) 268 (1951); Melton v. Hill, 251 N. C. 134, 110 S. E. (2d) 875 (1959). See also, J. A. Jones Constr. Co. v. Local Union 755, etc., 246 N. C. 481, 98 S. E. (2d) 852 (1957).

An unincorporated labor union may be sued in the courts of this State as a legal entity separate and apart from its members. R. H. Bouligny, Inc. v. United Steelworkers of America, AFL-CIO, 270 N.C. 160, 154 S.E.2d 344 (1967).

Necessity That Association Be Doing Business in State.—Under this section the service of process upon the Secretary of State is not binding on an unincorporated association or organization unless it is doing business in North Carolina by performing acts for which it is formed. Stafford v. Wood, 234 N. C. 622, 68 S. E. (2d) 268 (1951); Youngblood v. Bright, 243 N. C. 599, 91 S. E. (2d) 559 (1956).

When Service on Secretary of State Authorized.—Subsection (6) of this section authorizes service of process on the Secretary of State if an unincorporated association fails to appoint a process agent or fails to certify the name and address of such process agent as prescribed therein, but if it complies with the statutory requirements, service of process against it must be made on its designated process agent. Melton v. Hill, 251 N. C. 134, 110 S. E. (2d) 875 (1959).

Certification to Secretary of State Not Required. — No provision of subsection (6) of this section requires an unincorporated association to certify the name and address of its process agent to the Secretary of State or to file any notice of any kind in the office of the Secretary of State. Melton v. Hill, 251 N. C. 134, 110 S. E. (2d) 875 (1959).

Hence, Failure to So Certify Is Insufficient Basis for Service on Secretary. —The failure of a nonresident unincorporated association to certify to or file with the Secretary of State the name and address of its process agent does not constitute a sufficient basis for service of process on the Secretary of State. Melton v. Hill, 251 N. C. 134, 110 S. E. (2d) 875 (1959).

Nonresident Labor Union.—The finding that a labor union had an affiliated local union in North Carolina, merely indicated an undefined connection between the nonresident union and the resident local union. It did not show that the union was doing business in North Carolina by performing acts for which it was formed. Stafford v. Wood, 234 N. C. 622, 68 S. E. (2d) 268 (1951).

An unincorporated labor union doing business in North Carolina by performing acts for which it was formed can sue and be sued as a separate legal entity in the courts of this State, and may be served with process in the manner prescribed by statute. Martin v. Local 71, International Brotherhood of Teamsters, etc., 248 N. C. 409, 103 S. E. (2d) 462 (1958); Gainey v. Local 71, International Brotherhood of Teamsters, etc., 252 N. C. 256, 113 S. E. (2d) 594 (1960).

Where, in an action against a labor union, it is alleged that defendant union had agents in this State and carried on in this State the activities for which it was organized in representing employees residing in this State, but the court fails to find any facts in regard to the activities of defendant union, if any, carried on in this State, there are no findings supporting the court's conclusion that the union was not doing business in this State. Sizemore v. Maroney, 263 N.C. 14, 138 S.E.2d 803 (1964).

Evidence was sufficient to support a finding that a labor union was doing business in North Carolina by performing some of the acts for which it was formed. Reverie Lingerie, Inc. v. McCain, 258 N. C. 353. 128 S E. (2d) 835 (1963).

Burden of Showing That Secretary of State Did Not Forward Copy of Process. —If the Secretary of State did not forward a copy of the process served upon him to defendant labor union, the burden was on the union to show it. J. A. Jones Constr. Co. v. Local Union 755, etc., 246 N. C. 481, 98 S. E. (2d) 852 (1957).

Cited in Beaty v. International Ass'n of Heat & Frost Insulators, etc., 248 N. C. 170, 102 S. E. (2d) 763 (1958).

§ 1-98. Service of process by publication and service of process outside the State; definition. — As used in G. S. 1-98 through G. S 1-108, "process" includes summons, order to show cause and any other order or notice issued in any action or special proceeding, legal service of which is a requisite to the relief sought. (Code, ss. 218, 221; 1885, c. 380; 1889, cc. 108, 263; 1895, c. 334; Rev., s. 442; C. S., s. 484; 1947, c. 838; 1949, c. 85; 1953, c. 919, s. 1.)

Editor's Note. — Session Laws 1953, c. 919, s. 1, effective July 1, 1953, struck out former §§ 1-98 and 1-99, and inserted in lieu thereof present §§ 1-98 through 1-99.4. For comment on the 1953 act, see 31 N. C. Law Rev. 391.

Service of process by publication is in derogation of the common law. Harrison v. Hanvey, 265 N.C. 243, 143 S.E.2d 593 (1965).

Statute Strictly Construed.—See Jones v. Jones, 243 N. C. 557, 91 S. E. (2d) 562 (1956); Carpenter v. Carpenter, 244 N. C. 286, 93 S. E. (2d) 617 (1956); Bank of Wadesboro v. Jordan, 252 N. C. 419, 114 S. E. (2d) 82 (1960).

Statutes authorizing service of process by publication are strictly construed, both as grants of authority and in determining whether service has been made in conformity with the statute. Harrison v. Hanvey, 265 N.C. 243, 143 S.E.2d 593 (1965).

Applied in Accident Indem. Ins. Co. v. Johnson, 261 N.C. 778, 136 S.E.2d 95 (1964).

Cited in Batts v. United States, 120 F. Supp. 26 (1954); Thrush v. Thrush, 246 N. C. 114, 97 S. E. (2d) 472 (1957).

§ 1-98.1. Service of process by publication and service of process outside the State; when allowed. — Service of process by publication or service of process outside the State may be ordered in the kinds of actions and special proceedings set out in G. S. 1-98.2, with respect to persons described in G. S. 1-98.3, upon the filing of the sworn statement required by G. S. 1-98.4. (1953, c. 919, s. 1.)

§ 1-98.2. Actions and special proceedings in which service of process may be had by publication or by service of process outside the State.—Service of process by publication or service of process outside the State may be had in the following kinds of actions and special proceedings:

(1) Those in which the court has jurisdiction over the real or personal property which is the subject matter of the litigation;

(2) Those in which the court by order of attachment granted therein at any time prior to judgment secures control over property belonging to the person to be served;

(3) Those for annulment of marriage, divorce, adoption or custody of a minor child, or for any other relief involving the domestic status of the person to be served;

(4) Those for the purpose of revoking, cancelling, suspending or otherwise regulating licenses issued or privileges granted by the State or any political subdivision thereof, or by any agency of either, to the person to be served; and

(5) Any other actions and special proceedings in rem or quasi in rem in which the court has jurisdiction over the res.

(6) Where the defendant, a resident of this State, has departed therefrom or keeps himself concealed therein with intent to defraud his creditors or to avoid the service of summons. (1953, c. 919, s. 1; 1957, c. 553.)

Editor's Note.—The 1957 amendment added subdivision (6).

Constitutionality. — The great majority of cases have sustained the validity of a personal judgment recovered against a resident or a domestic corporation upon substituted or constructive service of process where he or it could not be personally served within the State, and the constitutionality of statutes authorizing such service has generally been sustained so far as residents are concerned. Harrison v. Hanvey, 265 N.C. 243, 143 S.E.2d 593 (1965).

The character of the service usually plays a determinative role in a decision whether the service will be sustained. Harrison v. Hanvey, 265 N.C. 243, 143 S.E.2d 593 (1965).

Constructive Service upon Nonresident Ineffectual in Action in Personam.—In an action in personam constructive service by publication, or personal service outside the State upon a nonresident is ineffectual for any purpose. Trinity Methodist Church v. Miller, 260 N.C. 331, 132 S.E.2d 688 (1963).

A judgment in personam rendered in a state court against a nonresident upon constructive service cannot be enforced even in the state where it was rendered. Harrison v. Hanvey, 265 N.C. 243, 143 S.E.2d 593 (1965).

Action Solely Ex Contractu Is Not within Provisions of Subdivision (1).—An action for breach of contract to rebuild a church organ, the nonresident contractor claiming no interest in the organ nor any lien thereon, is an action solely ex contractu and does not come within the provisions of subdivision (1) of this section so as to authorize service of process on the nonresident contractor under § 1-104 (a). Trinity Methodist Church v. Miller, 260 N.C. 331, 132 S.E.2d 688 (1963).

Subdivision (3) Does Not Authorize Judgment for Child Support.—In a divorce action, service of process outside the State under subdivision (3) of this section does not give the court authority to enter judgment against the defendant for the support of the children. Fleek v. Fleek, 270 N.C. 736, 155 S.E.2d 290 (1967).

Application of Subdivision (6).—Subdivision (6) has no application to a nonresident of this State. Trinity Methodist Church v. Miller, 260 N.C. 331, 132 S.E.2d 688 (1963).

Subdivision (6) applies only where the defendant is a resident of this State and has departed therefrom or keeps himself concealed therein with intent to defraud his creditors or to avoid the service of process. Trinity Methodist Church v. Miller, 260 N.C. 331, 132 S.E.2d 688 (1963).

Subdivision (6) can have no application when it appears from the complaint that defendant is a nonresident or if it does not affirmatively appear that he is a resident who has left the State for the purpose of defrauding his creditors and avoiding service of summons. Trinity Methodist Church v. Miller, 260 N.C. 331, 132 S.E.2d 688 (1963).

A resident of the State who has departed with intent to defraud his creditors or to avoid service of process, or a resident who keeps himself concealed in the State with like intent, is amenable to service of process by publication under subdivision (6) of this section. Harrison v.

Hanvey, 265 N.C. 243, 143 S.E.2d 593 (1965).

Proof under Subdivision (6).—Since no comma separates the two predicates in subdivision (6) of this section, the intent to defraud creditors or to avoid the service of summons must be shown both as to departure and as to concealment. Harrison v. Hanvey, 265 N.C. 243, 143 S.E.2d 593 (1965).

What Complaint and Affidavit Must Show.—In order to be a valid service of process under § 1-104, it must appear by affidavit or by verified complaint treated as an affidavit, that the requirements of § 1-98.4 have been met and that the cause of action is within the purview of this section. Lane Trucking Co. v. Haponski, 260 N.C. 514, 133 S.E.2d 192 (1963).

Description of Real Estate. — Where service by publication was obtained under provisions of an earlier statute, service was held to be questionable because publication merely notified defendants that action had commenced "concerning real estate, of which the superior court of the said county has jurisdiction." Menzel v. Menzel, 250 N. C. 649, 110 S. E. (2d) 333 (1959).

Applied in Surratt v. Surratt, 263 N.C. 466, 139 S.E.2d 720 (1965).

§ 1-98.3. Persons upon whom service of process may be had by publication or by service of process outside the State.—(a) Service of process by publication or service of process outside the State may be had upon any person, natural or corporate, known or unknown, when, after due diligence, personal service cannot be had within the State.

(b) The persons described in subsection (a) of this section shall include, but not be limited to,

(1) Natural persons, whether residents or nonresidents of this State, including infants and incompetents as described in subsections (2) and (3) of G. S. 1-97 when personal service is had upon the guardian or other person required to be served by such subsections, and persons whose existence or identity or residence remains unknown;

(2) Stockholders of corporations or of joint stock companies, even though their existence or identity or residence remains unknown, where the action against the stockholders of such corporations or joint stock companies is authorized by law;

(3) Joint stock associations or other unincorporated associations, even though their existence or identity or residence remains unknown;

(4) Any corporation or other legal entity, whether it is foreign, domestic, or its domicile is unknown, and whether it is dissolved or existing, including corporations or other legal entities not known to be dissolved or existing;

(5) Any business or operation which has done business or operated under a name which includes the word "corporation", "company", "incorporated", "inc.", or any combination thereof, or under a name which indicates or tends to indicate, that the same may be a corporation or other legal entity. (1953, c. 919, s. 1.)

Cross Reference.—As to resident defendant in proceeding to condemn school site, see § 115-85 and note.

Applied in Harris v. Upham, 244 N. C. 477, 94 S. E. (2d) 370 (1956).

§ 1-98.4. Affidavit for service of process by publication or service of process outside the State; amendment thereof; extension of time for pleading. — (a) To secure an order for service of process by publication or service of process outside the State, the applicant must file in the office of the clerk of the court where the action is brought a statement in his verified pleading or separate affidavit, sworn to by the applicant, his agent or attorney, stating:

(1) That he is a party, or the agent or attorney of a party, to the action or special proceeding; and

(2) The facts with sufficient particularity to show: That the action or special proceeding is one of those specified in G. S. 1-98.2, that a cause of action exists against the person to be served or that he is a proper party, and that the action

or special proceeding is of such a kind that the court will have jurisdiction upon service of process by publication or service of process outside the State; and

(3) That, after due diligence, personal service cannot be had within the State; and

(b) Where such service is to be had upon a natural person, the verified pleading or affidavit must state:

(1) The name and residence of such person, or if they are unknown, that diligent search and inquiry have been made to discover such name and residence, and that they are set forth as particularly as is known to the applicant;

(2) That such person is a minor or an incompetent, if such fact is known to the applicant.

(c) Where such service is to be had upon a corporation, the verified pleading or affidavit must state:

(1) The name, domicile, principal place of business of the corporation, whether it be foreign or dissolved, and if such facts are unknown, that diligent search and inquiry have been made to discover same and that they are set forth in the affidavit as particularly as is known to the applicant.

(2) Whether or not the corporation is qualified to do business in this State, unless shown to be a North Carolina corporation.

(d) Where such service is to be had upon a business or operation doing business or operating under a name which indicates or tends to indicate that the same may be a corporation or other legal entity, the verified pleading or affidavit must state:

(1) The name under which said business or operation has been conducted;

(2) That after diligent search and inquiry the applicant has been unable to ascertain whether or not the organization operating under said name is a corporation, either foreign or domestic;

(3) The names and places of residence, if known, of all persons known to own an interest in such organization, and whether or not other or unknown persons may own any interest in such organization; or that, after diligent search and inquiry, all persons owning an interest in such organization are unknown to the applicant.

(e) Where such service is to be had upon unknown persons, the verified pleading or affidavit must state:

(1) That the plaintiff believes there are persons who are or may be interested in the subject matter of the action or special proceeding whose names are unknown to the applicant; and

(2) Whether said unknown persons are or may be interested as heirs, devisees, grantees, assignees, lienors, grantors, trustees or otherwise, and the nature of such interest, if known to the applicant.

(f) When an affidavit provided for by this section is defective, the judge or clerk may allow the affidavit to be amended and may issue a new order for service of process thereon.

(g) Where an order for publication is sought upon an affidavit instead of a verified pleading, the clerk may, on application, by written order extend the time for filing the pleading to a day certain, for a period not to exceed twenty (20) days from the filing of the affidavit. (1953, c. 919, s. 1.)

Affidavit Must Allege That Person Served Cannot Be Found within State.—An affidavit on which publications is predicated is fatally defective in the absence of an allegation that the person on whom the summons is so served cannot, after due diligence, be found within the State. Nash County v. Allen, 241 N. C. 543, 85 S. E. (2d) 921 (1955).

Requirements of Statute Must Be Strictly Followed.—Where service of summons is made by publication, the requirements of the statute must be strictly followed, and everything necessary to dispense with personal service of summons must appear by affidavit. Nash County v. Allen, 241 N. C. 543, 85 S. E. (2d) 921 (1955).

A prerequisite prescribed by statute to support an order of service by publication is jurisdictional. The omission from the pleadings or affidavit of any of the required information or averments, on which the order for substitute service is predicated, is fatal. Jones v. Jones, 243 N C. 557, 91 S. E. (2d) 562 (1956).

Compliance with this statute is mandatory. The affidavit or sworn statement "That, after due diligence, personal service cannot be had within the State," is jurisdictional. Without it, service outside the State is ineffectual to bring the defendant into court. Temple v. Temple, 246 N. C. 334, 98 S. E. (2d) 314 (1957).

The affidavit in compliance with this section is jurisdictional. Lane Trucking Co. v. Haponski, 260 N.C. 514, 133 S.E.2d 192 (1963).

The affidavit required to support an order for service of summons by publication is jurisdictional. The omission therefrom of any of the essential averments on which an order for substitute service is predicated is fatal. Harrison v. Hanvey, 265 N.C. 243, 143 S.E.2d 593 (1965).

Affidavit Must Show Compliance with This Section and That Case Comes within § 1-98.2.—In order to be a valid service of process under § 1-104, it must appear by affidavit or by verified complaint treated as an affidavit, that the requirements of this section have been met and that the cause of action is within the purview of § 1-98.2. Lane Trucking Co. v. Haponski, 260 N.C. 514, 133 S.E.2d 192 (1963).

To sustain service upon defendant by publication, plaintiff must show: (1) That the case is one in which service by publication is authorized by statute; and (2) that the questioned service has been made in accordance with statutory requirements. Harrison v. Hanvey, 265 N.C. 243, 143 S.E.2d 593 (1965).

To secure an order for service by publication, in his affidavit the applicant must state, inter alia, in addition to averring facts which show the action to be one of those specified in § 1-98.2, the name and residence of the person to be served; or, if they are unknown, that diligent search and inquiry have been made to discover such name and residence; and that they are set forth as particularly as is known to the applicant. Harrison v. Hanvey, 265 N.C. 243, 143 S.E.2d 593 (1965).

Amicus Curiae Is Not Competent to Make Affidavit. — An amicus curiae may not assume the place of a party in a legal action and is not a competent person under this section to make the jurisdictional affidavit for service by publication. Shaver v. Shaver, 248 N. C. 113, 102 S. E. (2d) 791 (1958).

If no address is known, or has never been known, the applicant should so state. Harrison v. Hanvey, 265 N.C. 243, 143 S.E.2d 593 (1965).

The failure to find defendant at his last known address does not eliminate the requirement that the applicant for an order allowing service by publication should set out the residence of defendant "as particularly as is known to the applicant." Harrison v. Hanvey, 265 N.C. 243, 143 S.E.2d 593 (1965).

It is sufficient if the affidavit states the ultimate fact of due diligence substantially in the language of the statute. Brown v. Doby, 242 N. C. 462, 87 S. E. (2d) 921 (1955).

An averment in the words of the statute of the ultimate fact, "that, after due diligence, personal service cannot be had within the State," was a sufficient compliance with statutory requirements without stating any of the probative, or evidentiary, facts. Harrison v. Hanvey, 265 N.C. 243, 143 S.E.2d 593 (1965).

Void Service of Process. — Where neither the pleadings nor affidavit state the residences of respondents to be served with process by publication, nor that their addresses were unknown, nor that they were minors, when this fact is known to petitioner, service of process based thereon is void. Jones v. Jones, 243 N C 557, 91 S. E. (2d) 562 (1956).

Where applicant failed to meet the requirements of subsection (b) (1) and (2), and the record failed to show that the clerk of the superior court had mailed the copy of notice as required by § 1-99.2 (c), the Supreme Court held the purported service of process by publication to be fatally defective and the judgment entered on it void. Harrison v. Hanvey, 265 N.C. 243, 143 S.E.2d 593 (1965).

Evidence held insufficient to establish that defendant kept himself concealed in the State in order to avoid service of process. Harrison v. Hanvey, 265 N.C. 243, 143 S.E.2d 593 (1965).

Quoted in Trinity Methodist Church v. Miller, 260 N.C. 331, 132 S.E.2d 688 (1963).

§ 1-99. Order for service of process by publication or service of process outside the State.—If the verified pleading or affidavit conforms to the requirements of G. S. 1-98.4, and if it appears to the satisfaction of the

judge or clerk that the person to be served cannot, after due diligence, be found in the State, the judge or clerk shall, at the election of the plaintiff, either

(1) Make an order for service of process by publication of the notice provided for in G. S. 1-99.2 once a week for four successive weeks in a designated newspaper, which newspaper must be one qualified for legal advertising pursuant to G. S. 1-597; or

(2) Make an order for service of process outside the State pursuant to G. S. 1-104. (C. C. P., c. 84; 1876-7, c. 241, s. 3; Code, s. 219; 1903, c. 134; Rev., s. 443; C. S., s. 485; 1949, c. 205, s. 1; 1953, c. 919, s. 1.)

Cross Reference.—See note to § 1-98.

The purpose of publication is to give notice to the party named in the notice. Harrison v. Hanvey, 265 N.C. 243, 143 S.E.2d 593 (1965).

The means employed to give notice must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. Harrison v. Hanvey, 265 N.C. 243, 143 S.E.2d 593 (1965).

Publication in an obscure paper or one far removed from any location with which defendant has ever had any contact will not constitute service of summons by publication. Harrison v. Hanvey, 265 N.C. 243, 143 S.E.2d 593 (1965).

Cited in Menzel v. Menzel, 250 N. C. 649, 110 S. E. (2d) 333 (1959); Lane Trucking Co. v. Haponski, 260 N.C. 514, 133 S.E.2d 192 (1963).

§ 1-99.1. Form of order for service of process by publication or service of process outside the State.—An order for service of process by publication or service of process outside the State in substantially the following form is sufficient:

STATE OF NORTH CAROLINA

IN THE SUPERIOR COURT

..... COUNTY

(Title of action or special proceeding)

ORDER FOR SERVICE OF PROCESS
(Strike out one of the following)
BY PUBLICATION
OUTSIDE THE STATE

(An affidavit)
(A verified pleading)

satisfying the requirements of G. S. 1-98.4

having been duly filed herein, and it appearing to the satisfaction of the undersigned that ..... (Party to be served) cannot, after due diligence, be found in the State, it is now, therefore,

ORDERED

That service of process in the above-entitled (action) (special proceeding) upon ..... (Party to be served) be made (Strike out one of the following)

By publication in ..... (Newspaper) once a week for four successive weeks of the notice issued by the undersigned as provided by G. S. 1-99.2.

By service of process outside the State as provided by G. S. 1-104.

..... (Judge) (Clerk)
Superior Court

(1953, c. 919, s. 1.)

§ 1-99.2. Notice of service of process by publication. — (a) The judge or clerk who signs the order for service of process by publication provided for in G. S. 1-99.1 shall issue a notice of service of process by publication which shall

(1) Designate the court in which the action or special proceeding has been commenced and the title of the action or special proceeding;

(2) Be directed to the person to be thus served;

(3) State either that a pleading seeking relief against the person to be served has been filed in the action or special proceeding, or has been required to be filed therein not later than a date named in the notice;

(4) State the nature of the relief being sought;

(5) Require the person to be served to make defense to such pleading not later than a designated date, and notify him that upon his failure to do so the party seeking service will apply to the court for the relief sought.

(b) The date to be designated pursuant to paragraph (5) of subsection (a) of this section shall be the date when, after completion of service of process by publication, as provided by G. S. 1-100, the time for answering expires as provided by G. S. 1-125.

(c) The clerk shall mail a copy of the notice of service of process by publication to each party whose name and residence or place of business appear in the verified pleading or affidavit pursuant to the provisions of G. S. 1-98.4. Such copies shall be sent via ordinary mail, addressed to each party at the address of such party's residence or place of business as set forth in the verified complaint or affidavit, and shall be posted in the mails not later than five (5) days after the issuance of the order for service of process by publication. By certificate at the bottom of the order for service of process by publication or by separate certificate filed with the order, the clerk shall certify that a copy of the notice of service of process by publication has been duly mailed to each party whose name and residence or place of business appear in the verified pleading or affidavit, giving the date of posting thereof in the mails, and the clerk shall make an appropriate record thereof in accordance with the provisions of G. S. 2-42.

Failure on the part of any party to receive a copy of the notice mailed in accordance with the provisions hereof shall not affect the validity of the service of process upon such party by publication, and no such copy of the notice need be mailed to any party as to whom the verified pleading or affidavit states that such party's residence or place of business is unknown and that diligent search and inquiry have been made to discover same. (1953, c. 919, s. 1.)

When Notice of Service Not Required.— This section does not require the clerk to mail defendant a copy of notice of service of process by publication when plaintiff's affidavit stated defendant's residence was unknown and diligent search and inquiry had been made to discover it. Stokes v. Stokes, 260 N.C. 203, 132 S.E.2d 315 (1963).

Failure of Clerk to Mail Notice. — In Harmon v. Harmon, 245 N.C. 83, 95 S.E.2d 355 (1956), a judgment was vacated for failure of the clerk of the superior court to mail the notice. Harrison v. Hanvey, 265 N.C. 243, 143 S.E.2d 593 (1965).

Where applicant failed to meet the requirements of § 1-98.4 (b) (1) and (2), and the record failed to show that the clerk of the superior court had mailed the copy of notice as required by subsection (c) of this section, the Supreme Court held the purported service of process by publication to be fatally defective and the judgment entered on it void. Harrison v. Hanvey, 265 N.C. 243, 143 S.E.2d 593 (1965).

Failure of party to receive copy of notice mailed as required by this section does not invalidate the service of process by publication. Harrison v. Hanvey, 265 N.C. 243, 143 S.E.2d 593 (1965).

Applied in Ward v. Kolman Mfg. Co., 267 N.C. 131, 148 S.E.2d 21 (1966).

Cited in Jones v. Jones, 243 N. C. 557, 91 S. E. (2d) 562 (1956); Harmon v. Harmon, 245 N C. 83, 95 S. E. (2d) 355 (1956); Shaver v. Shaver, 248 N. C. 113, 102 S. E. (2d) 791 (1958).

§ 1-99.3. Form of notice of service of process by publication.—A notice of service of process by publication in substantially the following form, is sufficient:

NOTICE OF SERVICE OF PROCESS
BY PUBLICATION
STATE OF NORTH CAROLINA
..... COUNTY
IN THE SUPERIOR COURT

(Title of action or special proceeding)

To .....: (Person to be served)

Take notice that

A pleading seeking relief against you (has been filed) (is required to be filed not later than ....., 19..) in the above entitled (action) (special proceeding).

The nature of the relief being sought is as follows:

(State nature)

You are required to make defense to such pleading not later than ....., 19.., and upon your failure to do so the party seeking service against you will apply to the court for the relief sought.

This, the ..... day of ....., 19...

..... (Judge) (Clerk)
Superior Court

(1953, c. 919, s. 1.)

Quoted in Harrison v. Hanvey, 265 N.C. 243, 143 S.E.2d 593 (1965).

§ 1-99.4. Cost of publication of notice in lieu of personal service.—The cost of publishing a notice as provided by G. S. 1-98 through G. S. 1-99.3 shall be governed by the provisions of G. S. 1-596 relating to legal advertising. (1953, c. 919, s. 1.)

§ 1-100. When service by publication complete; time for pleading.—In the cases in which service by publication is allowed, the summons is deemed served at the expiration of seven (7) days from the date of the last publication, and the party so served is then in court. He shall then have such time thereafter to make defense as is provided in G. S. 1-125. (C. C. P., s. 88; Code, s. 227; Rev., s. 444; C. S., s. 487; 1939, c. 49, s. 1; 1945, c. 158; 1953, c. 919, s. 2.)

Editor's Note.—

The 1953 amendment, effective July 1, 1953, rewrote the second sentence. For comment on amendment, see 31 N. C. Law Rev. 391.

Applied in Chappell v. Stallings, 237 N. C. 213, 74 S. E. (2d) 624 (1953).

Cited in Jones v. Jones, 243 N. C. 557, 91 S. E. (2d) 562 (1956).

§ 1-101. Jurisdiction acquired from service.

Applied in Walker v. Story, 262 N.C. 707, 138 S.E.2d 535 (1964).

§ 1-102. Proof of service.—(a) Proof of service of summons within the State may be:

(1) By the written return of the sheriff or other officer authorized to serve the summons showing personal service thereof; or

(2) By the acceptance of service in writing signed by the party to be served; or

(3) By the admission in writing of the party of service on him.

(b) Proof of service of summons outside the State may be:

(1) By the written return of a process officer pursuant to the provisions of G. S. 1-104; or

(2) By the written admission or acceptance of service by the party to be served, when acknowledged before some person authorized to take such acknowledgments pursuant to G. S. 47-2. When such admission or acceptance includes an express submission to the jurisdiction of the court trying the action, it shall constitute a general appearance for all purposes.

(c) Proof of service by publication may be by affidavit of publication as provided by G. S. 1-600. (C. C. P. s. 89; Code, s. 228; Rev., s. 446; C. S., s. 489; 1951, c. 1005, s. 1; 1953, c. 103.)

Editor's Note.—

The 1953 amendment, effective July 1, 1953, rewrote this section. For comment on amendment, see 31 N. C. Law Rev. 394.

Stated in Tyndall v. Triangle Mobile Homes, Inc., 264 N.C. 467, 142 S.E.2d 21 (1965).

Cited in Shaver v. Shaver, 248 N. C. 113, 102 S. E. (2d) 791 (1958).

§ 1-103. Voluntary appearance by defendant.

Effect of General Appearance.—

In accord with 1st paragraph in original. See Brittain v. Blankenship, 244 N. C. 518, 94 S. E. (2d) 489 (1956); Harmon v. Harmon, 245 N. C. 83, 95 S. E. (2d) 355 (1956).

In accord with 3rd paragraph in original. See Hamlet Hospital v. Joint Committee, 234 N. C. 673, 68 S. E. (2d) 862 (1952).

General Appearance Defined. — A general appearance is one whereby the defendant submits his person to the jurisdiction of the court by invoking the judgment of the court in any manner on any question other than that of the jurisdiction of the court over his person. In re Blalock, 233 N. C. 493, 64 S. E. (2d) 848, 25 A. L. R. (2d) 818 (1951).

Demurrer as General Appearance.—Demurrer on the ground that the complaint does not state a cause of action or for defect of parties is a general appearance. Murphy v. Murphy, 261 N.C. 95, 134 S.E.2d 148 (1964).

Not being entitled to a dismissal of the action for want of service of summons, defendant's demurrer brings him in by general appearance and waives service of process. Murphy v. Murphy, 261 N.C. 95, 134 S.E.2d 148 (1964).

The filing of motions for change of venue, as a matter of right and for the convenience of the witnesses, constituted general appearances which gave the general county court the same power over the defendant that it would have acquired over a resident duly served with summons. Waters v. McBee, 244 N. C. 540, 94 S. E. (2d) 640 (1956).

Appearance of party under order of court for purpose of pretrial examination does not amount to a waiver of service of summons, since the appearance is not voluntary. B-W Acceptance Corp. v. Spencer, 268 N.C. 1, 149 S.E.2d 570 (1966).

Quoted in East Carolina Lumber Co. v. West, 247 N. C. 699, 102 S. E. (2d) 248 (1958).

§ 1-104. **Service of process outside the State.** — (a) In all actions and special proceedings in which a verified pleading or an affidavit for service of process outside the State has been filed pursuant to G. S. 1-98.4, and an order for such service has been issued pursuant to G. S. 1-99, it shall be sufficient for service of process outside the State to mail the original and a copy of the process, together with a copy of such pleading or affidavit, to the sheriff or other process officer of the county or corresponding governmental subdivision of the state where the party to be served is located, who shall serve same according to its tenor. Such process shall be directed to the sheriff of the county in which it is issued, and no seal thereon shall be required.

(b) The process officer who serves the process shall, in making his return, use a form of certificate substantially as follows:

STATE OF .....
COUNTY OF .....

AFFIDAVIT OF SERVICE OF SUMMONS AND CLERK'S CERTIFICATE

I, ..., (Sheriff or other process officer) of ..... (County or governmental subdivision) being duly sworn, do certify that on the .... day of ....., 19.., I served the attached process by delivering a copy thereof to ....., the party to be served therein named, together with a copy of ..... (List other papers served).

..... (Sheriff or other process officer)

I, ..., Clerk of the ..... Court of ....., (County or governmental subdivision) State of ....., do certify that said court is a court of record having the seal hereto attached; that ..... is well known to me as ..... (Sheriff or other process officer) of said ....., (County or governmental subdivision) and that he has full power and authority to serve any and all legal process issuing from courts of this State; that said ..... personally appeared before me this day and made and subscribed the above affidavit relative to service of process on ....., the party to be served therein named.

This, the .... day of ....., 19...
(Here affix official seal)

.....
Clerk of the ..... Court of
.....
(County or governmental subdivision)
State of .....

(1891, c. 120; Rev., s. 488; C. S., s. 491; 1943, c. 543; 1945, c. 139; 1953, c. 919, s. 3.)

Editor's Note. —

The 1953 amendment, effective July 1, 1953, rewrote this section. For comment on amendment, see 31 N. C. Law Rev. 291.

Constructive Service upon Nonresident Ineffectual in Action in Personam.—In an action in personam constructive service by publication, or personal service outside the State upon a nonresident is ineffectual for any purpose. Trinity Methodist Church v. Miller, 260 N.C. 331, 132 S.E.2d 688 (1963); Lane Trucking Co. v. Haponski, 260 N.C. 514, 133 S.E.2d 192 (1963).

Service of process on a nonresident under this section cannot confer jurisdiction of the person upon the North Carolina court so as to enable it to render a valid judgment in personam. Lane Trucking Co. v. Haponski, 260 N.C. 514, 133 S.E.2d 192 (1963).

How Jurisdiction in Action in Personam Acquired.—Jurisdiction of a party in an action in personam can only be acquired by personal service of process within the territorial jurisdiction of the court, or by acceptance of service, or by general appearance, active or constructive. Lane Trucking Co. v. Haponski, 260 N.C. 514, 133 S.E.2d 192 (1963).

A judgment in personam cannot be rendered against a defendant unless personal service of process is had upon him within the State or he has accepted service, or by general appearance, active or constructive, has waived service, and personal service outside the State under this section is ineffectual to give the court jurisdiction over the person. Trinity Methodist Church v. Miller, 260 N.C. 331, 132 S.E.2d 688 (1963).

Service Outside State on Nonresident in Action for Alimony, Custody and Support.—A wife may not institute an action for the custody, support and maintenance of the minor children born of the marriage, and for alimony without divorce, and procure an in personam judgment against her nonresident husband by service of process on him outside the State, pursuant to the provisions of this section. Surratt v. Surratt, 263 N.C. 466, 139 S.E.2d 720 (1965).

What Affidavit or Verified Complaint Must Show.—In order to be a valid service of process under this section, it must appear by affidavit or by verified complaint

treated as an affidavit, that the requirements of § 1-98.4 have been met and that the cause of action is within the purview of § 1-98.2. Lane Trucking Co. v. Haponski, 260 N.C. 514, 133 S.E.2d 192 (1963).

Applied in Harris v. Upham, 244 N. C. 477, 94 S. E. (2d) 370 (1956); First-Citizens Bank & Trust Co. v. Barnes, 257 N. C. 274, 125 S. E. (2d) 437 (1962); In re Kenan, 262 N.C. 627, 138 S.E.2d 547 (1964).

§ 1-105. Service upon nonresident drivers of motor vehicles and upon the personal representatives of deceased nonresident drivers of motor vehicles.—The acceptance by a nonresident of the rights and privileges conferred by the laws now or hereafter in force in this State permitting the operation of motor vehicles, as evidenced by the operation of a motor vehicle by such nonresident on the public highways of this State, or at any other place in this State, or the operation by such nonresident of a motor vehicle on the public highways of this State or at any other place in this State, other than as so permitted or regulated, shall be deemed equivalent to the appointment by such nonresident of the Commissioner of Motor Vehicles, or his successor in office, to be his true and lawful attorney and the attorney of his executor or administrator, upon whom may be served all summonses or other lawful process in any action or proceeding against him or his executor or administrator, growing out of any accident or collision in which said nonresident may be involved by reason of the operation by him, for him, or under his control or direction, express or implied, of a motor vehicle on such public highways of this State, or at any other place in this State, and said acceptance or operation shall be a signification of his agreement that any such process against him or his executor or administrator shall be of the same legal force and validity as if served on him personally, or on his executor or administrator.

Service of such process shall be made in the following manner:

(1) By leaving a copy thereof, with a fee of one dollar ($1.00), in the hands of the Commissioner of Motor Vehicles, or in his office. Such service, upon compliance with the other provisions of this section shall be sufficient service upon the said nonresident.

(2) Notice of such service of process and copy thereof must be forthwith sent by registered mail by plaintiff or the Commissioner of Motor Vehicles to the defendant, and the entries on the defendant's return receipt shall be sufficient evidence of the date on which notice of service upon the Commissioner of Motor Vehicles and copy of process were delivered to the defendant, on which date service on said defendant shall be deemed completed. If the defendant refuses to accept the registered letter, service on the defendant shall be deemed completed on the date of such refusal to accept as determined by notations by the postal authorities on the original envelope, and if such date cannot be so determined, then service shall be deemed completed on the date that the registered letter is returned to the plaintiff or Commissioner of Motor Vehicles, as determined by postal marks on the original envelope. If the registered letter is not delivered to the defendant because it is unclaimed, or because he has removed himself from his last known address and has left no forwarding address or is unknown at his last known address, service on the defendant shall be deemed completed on the date that the registered letter is returned to the plaintiff or Commissioner of Motor Vehicles.

(3) The defendant's return receipt, or the original envelope bearing a notation by the postal authorities that receipt was refused, and an affidavit by the plaintiff that notice of mailing the registered letter and refusal to accept was forthwith sent to the defendant by ordinary mail, together with the plaintiff's affidavit of compliance with the provisions of this section must be appended to the summons or other

process and filed with said summons, complaint and other papers in the cause.

Provided, that where the nonresident motorist has died prior to the commencement of an action brought pursuant to this section, service of process shall be made on the executor or administrator of such nonresident motorist in the same manner and on the same notice as if provided in the case of a nonresident motorist.

The court in which the action is pending shall order such continuance as may be necessary to afford the defendant reasonable opportunity to defend the action. (1929, c. 75, s. 1; 1941, c. 36, s. 4; 1951, c. 646; 1953, c. 796; 1955, c. 1022; 1961, c. 1191; 1963, c. 491.)

Editor's Note.—

The 1953 amendment rewrote this section and made it applicable to the personal representatives of deceased nonresident drivers of motor vehicles.

The 1955 amendment inserted the words "or at any other place in this State" at three places in the first paragraph.

The 1961 amendment added the last sentence of subdivision (2).

The 1963 amendment inserted the words "because it is unclaimed, or" near the beginning of the last sentence of subdivision (2).

For brief comment on the 1951 amendment, see 29 N. C. Law Rev. 372.

For comment on the 1953 amendment, see 31 N. C. Law Rev. 395.

For brief comment on the 1955 amendment, see 33 N. C. Law Rev. 530.

For case law survey on process, see 41 N. C. Law Rev. 524.

For case law survey on pleading and parties, see 43 N.C.L. Rev. 873 (1965).

For case law survey on trial practice, see 43 N.C.L. Rev. 938 (1965).

Purpose of Section.—The broad purpose of this section is to enable a resident motorist to bring a nonresident motorist, who would otherwise be beyond this jurisdiction by the time suit could be instituted, within the jurisdiction of our courts to answer for a negligent injury inflicted while the nonresident was using the highways of this State. Hart v. Queen City Coach Co., 241 N. C. 389, 85 S. E. (2d) 319 (1955).

The evident purpose of this section is to extend the State's judicial power broadly to permit North Carolina residents to acquire jurisdiction over nonresidents who may be held responsible for injuries or death caused by their automobiles. Davis v. St. Paul-Mercury Indemnity Co., 294 F. (2d) 641 (1961).

This section is constitutional, etc.—

In accord with original. See Davis v. Martini, 233 N. C. 351, 64 S. E. (2d) 1 (1951); Ewing v. Thompson, 233 N. C. 564, 65 S. E. (2d) 17 (1951).

The fundamental requisites of due process are notice and opportunity to be heard, both of which are adequately provided for by this section. Denton v. Ellis, 258 F. Supp. 223 (E.D.N.C. 1966).

This section has been considered against a constitutional background and upheld as giving adequate notice to the defendant and as a reasonable exercise of jurisdiction. Denton v. Ellis, 258 F. Supp. 223 (E.D.N.C. 1966).

A state may, in the exercise of its police power, provide that a nonresident motorist using its highways shall be deemed to have appointed a state official his agent to receive service of process in any action growing out of such use, if the statute provides a proper method for notifying the defendant of such service. Denton v. Ellis, 258 F. Supp. 223 (E.D.N.C. 1966).

This section does not in any way change or amend the law governing the commencement of actions or the contents of a summons. Carolina Plywood Distribs., Inc. v. McAndrews, 270 N.C. 91, 153 S.E.2d 770 (1967).

It Provides Artificial Method of Serving Process.—This section provides a statutory and artificial method by which duly issued process may be served on nonresident motorists. Carolina Plywood Distribs., Inc. v. McAndrews, 270 N.C. 91, 153 S.E.2d 770 (1967).

A narrow interpretation of this section would defeat its purpose. Davis v. St. Paul-Mercury Indemnity Co., 294 F. (2d) 641 (1961).

But Strict Compliance Is Required.—The provisions of this section are in derogation of the common law and must be strictly complied with. Carolina Plywood Distribs., Inc. v. McAndrews, 270 N.C. 91, 153 S.E.2d 770 (1967).

The issuance of a valid summons as provided in § 1-89 is necessary for there to be compliance with the provisions of this section. Carolina Plywood Distribs., Inc. v. McAndrews, 270 N.C. 91, 153 S.E.2d 770 (1967).

Essential Meaning of This Section and § 20-71.1 the Same. — Despite differences in the wording of this section and § 20-71.1, the essential meaning is the same. This section requires an affirmative finding as to agency, and § 20-71.1 establishes the rule that proof of ownership is prima facie evidence of such agency. Howard v. Sasso, 253 N. C. 185, 116 S. E. (2d) 341 (1960).

Statutes in Pari Materia.—Sections 20-22, 20-37, 20-38 and 20-78, dealing with the privilege and responsibilities of persons operating motor vehicles on the public highways of the State, and this section relating to service of process on a nonresident who has committed a tort in the operation of a vehicle on the public highways of the State, are dealing with the same subject matter and must be considered in pari materia. Morrisey v. Crabtree, 143 F. Supp. 105 (1956).

Section 1-89 and this section must be construed together and the provisions of both strictly complied with. Carolina Plywood Distribs., Inc. v. McAndrews, 270 N.C. 91, 153 S.E.2d 770 (1967).

Section Applies to Action on Judgment Entered in Another State.—This section applies to an action against an alleged joint tort-feasor based upon judgments entered in courts of other states, arising from an accident in this State. Carolina Coach Co. v. Cox, 337 F.2d 101 (4th Cir. 1964).

Purpose and Effect of 1953 Amendment.—The 1953 amendment to this section authorizes service of process on and the maintenance of an action against a foreign administrator of a nonresident driver fatally injured in a collision in this State to recover for the alleged negligent operation of the vehicle by the nonresident. Franklin v. Standard Cellulose Prods., Inc., 261 N.C. 626, 135 S.E.2d 655 (1964).

Except for changes in respect of the manner of service, it seems clear that the authorization of an action and service of process upon nonresident drivers of motor vehicles and upon the personal representatives of deceased nonresident drivers of motor vehicles was the only purpose and significant effect of the 1953 amendment. Franklin v. Standard Cellulose Prods., Inc., 261 N.C. 626, 135 S.E.2d 655 (1964).

An action authorized by this section as amended in 1953 is an exception to the general rule stated in Cannon v. Cannon, 228 N.C. 211, 45 S.E.2d 34 (1947). Franklin v. Standard Cellulose Prods., Inc., 261 N.C. 626, 135 S.E.2d 655 (1964).

The legislature, in the 1955 amendment, did not intend to enlarge and extend the meaning of the words "motor vehicle"; it intended only to broaden the area of such vehicular operation to include private ways and places on land not within the confines of public highways. The amendment does not undertake to change the type of vehicle, but merely enlarges the sphere of its operation. Byrd v. Piedmont Aviation, Inc., 256 N. C. 684, 124 S. E. (2d) 880 (1962).

Which Involves Only Motor-Driven Devices Used in Travel by Land.—The ordinary, popular and common acceptance of the term "motor vehicle" has no relation to machines used in travel by air; it involves only motor-driven devices used in travel by land. Byrd v. Piedmont Aviation, Inc., 256 N. C. 684, 124 S. E. (2d) 880 (1962).

An airplane is not a "motor vehicle" within the purview of this section. Byrd v. Piedmont Aviation, Inc., 256 N. C. 684, 124 S. E. (2d) 880 (1962).

Neither Ownership nor Physical Presence Is Necessary.—By the express language of this section, the operation of a motor vehicle by a nonresident on the highways is the equivalent of the appointment of the Commissioner of Motor Vehicles as process agent for the nonresident. Neither ownership nor physical presence in the motor vehicle is necessary for valid service. It is sufficient if the nonresident had the legal right to exercise control at the moment the asserted cause of action arose. Pressley v. Turner, 249 N. C. 102, 105 S. E. (2d) 289 (1958).

Under this section, the ownership or lack of ownership by the nonresident defendant of the motor vehicle involved in the accident is of no legal consequence in so far as his amenability to constructive service of process is concerned. Davis v. Martini, 233 N. C. 351, 64 S. E. (2d) 1 (1951).

State May Assert Jurisdiction over Owner as Well as Driver.—The State has a strong interest in being able to provide a convenient forum where its citizens may be able to seek, from the owner as well as from the actual operator, compensation for injuries that will often be extremely serious. Jurisdiction over the driver who inflicted the injury does not exhaust the State's interest; it is not pushing the matter too far to recognize that the State may also assert the jurisdiction of its courts over the owner who placed the vehicle in the driver's hands to take it onto the State's highways. Davis v. St. Paul-Mercury Indemnity Co., 294 F. (2d) 641 (1961).

Ownership of property, particularly that which is capable of inflicting serious injury, may fairly be coupled with an obligation upon the owner to stand suit where the property is or has been taken with his consent. Davis v. St. Paul-Mercury Indemnity Co., 294 F. (2d) 641 (1961).

Car Must Be under Control of Nonresident Defendant.—

In accord with 1st paragraph in original. See Howard v. Sasso, 253 N. C. 185, 116 S. E. (2d) 341 (1960).

This section provides for constructive service of process upon a nonresident defendant in either of the following situations: 1. Where the nonresident was personally operating the vehicle 2. Where the vehicle was being operated for the nonresident, or under his control or direction, express or implied. Davis v. Martini, 233 N. C. 351, 64 S. E. (2d) 1 (1951)

To sustain service of process under this section there must be a finding to the effect that the owner's motor vehicle, on the occasion of the collision, was being operated "for him, or under his control or direction." Howard v. Sasso, 253 N. C. 185, 116 S. E. (2d) 341 (1960).

But Owner May Be Presumed to Have Right of Control.—An automobile owner may not unreasonably be presumed to have a right to exercise control. Davis v. St. Paul-Mercury Indemnity Co., 294 F. (2d) 641 (1961).

And Unlikelihood that He Will Exercise It Is Immaterial.—The unlikelihood that the owner will in fact exercise his legal right to control the operation of the automobile is immaterial. Davis v. St. Paul-Mercury Indemnity Co., 294 F. (2d) 641 (1961).

The words "express or implied" suggest only a minimal connection between the driver and the owner, which is satisfied if the owner has a legal right to control the operation of the automobile. Davis v. St. Paul-Mercury Indemnity Co., 294 F. (2d) 641 (1961).

Owner Need Not Be Physically in a Position to Direct Driver.—This section does not require that the owner be physically in a position to direct the driver's every move. Davis v. St. Paul-Mercury Indemnity Co., 294 F. (2d) 641 (1961).

Driver Need Not Be Acting for Pecuniary Benefit of Owner.—This section does not require that the driver be acting for the pecuniary benefit of the owner. Davis v. St. Paul-Mercury Indemnity Co., 294 F. (2d) 641 (1961).

The "family purpose" doctrine is not determinative in interpreting this section where "control or direction" are the standards. Davis v. St. Paul-Mercury Indemnity Co., 294 F. (2d) 641 (1961).

Residence of defendant at time of accident controls the application of this section and §§ 1-105.1 and 1-107 under federal Rule 4 (d) 7. Denton v. Ellis, 258 F. Supp. 223 (E.D.N.C. 1966).

Section 1-105.1 makes this section applicable to residents of the State who leave and remain without the State subsequent to an accident. Denton v. Ellis, 258 F. Supp. 223 (E.D.N.C. 1966).

The method of serving process on a nonresident provided in this section and § 1-106 was ineffective to obtain service of process on a citizen and resident of this State while such citizen was residing temporarily outside the State, or is in the armed services of the United States and stationed in another state or foreign country. Foster v. Holt, 237 N. C. 495, 75 S. E. (2d) 319 (1953), decided prior to enactment of § 1-105.1.

Member of Armed Services Stationed Here under Military Orders. — The evidence tended to show that a member of the armed services, accompanied by his wife, was stationed in this State under military orders at the time of the accident in suit, that prior to his entry into service he was a resident of another state, and that at the time of the service of summons both had moved to another state incident to his orders, without evidence that they were in this State for any purpose other than that contemplated by his military service or that they ever formed any intention of making this State their place of residence, is held sufficient to support the trial court's finding of fact that at the time of the accident they were nonresidents so as to subject them to service of summons under this section. Hart v. Queen City Coach Co., 241 N. C. 389, 85 S. E. (2d) 319 (1955).

Family-Purpose Automobile Operated by Son of Owner.—A family-purpose automobile, owned by a resident of Canada, and operated by her son on a public highway in this State, is operated for the owner, or under her control or direction, express or implied, within the purview of this section. Ewing v. Thompson, 233 N. C. 564, 65 S. E. (2d) 17 (1951).

Resident of Canada Is "Nonresident".— A resident of Canada, operator of an automobile involved in an accident on a public highway in this State, is a "nonresident" within the purview of this section. Ewing v. Thompson, 233 N. C. 564, 65 S. E. (2d) 17 (1951).

Public Highways Include Public Streets.—When the legislature authorized the service of process on a nonresident in an action for damages growing out of an accident occurring on the public highways of North Carolina, it covered accidents on public streets as well as public roads, for both are public highways. Morrisey v. Crabtree, 143 F. Supp. 105 (1956).

The summons must command the sheriff or other proper officer to summons the defendant or defendants. Carolina Plywood Distribs., Inc. v. McAndrews, 270 N.C. 91, 153 S.E.2d 770 (1967).

Where the summons commanded the sheriff to summons the Commissioner of Motor Vehicles only and did not command the sheriff to summons the defendants at all and the Commissioner duly mailed a copy to the nonresident defendants, the nonresidents were not summoned and the court had no jurisdiction in the absence of a general appearance by them. Carolina Plywood Distribs., Inc. v. McAndrews, 270 N.C. 91, 153 S.E.2d 770 (1967).

Meaning of Subdivision (2).—The provision in subdivision (2) of this section making the defendant's return receipt "sufficient evidence of the date on which notice of service upon the Commissioner of Motor Vehicles and copy of process were delivered to the defendant," does not mean that all that is required to effect service upon a nonresident motorist is the return of a receipt for registered mail signed by the defendant. This provision did not replace the statutory scheme for substituted service; rather, it merely provided a conclusive means of determining when that service had been accomplished. Service is still to be made "by leaving" the process with the Commissioner of Motor Vehicles. Byrd v. Pawlick, 362 F.2d 390 (4th Cir. 1966).

Hence, where, apparently through inadvertence, the order for service of process upon a nonresident motorist under this section was directed to the sheriff of one county, but was forwarded by the plaintiff's attorneys to the sheriff of another county and by him served upon the Commissioner of Motor Vehicles, service was insufficient, notwithstanding that notice of service of process upon the Commissioner and a copy thereof did reach the defendant by registered mail as required by subdivision (2) of this section. Byrd v. Pawlick, 362 F.2d 390 (4th Cir. 1966).

Refusal to Accept Registered Mail.—A default judgment will not be vacated where nonresident defendants knew plaintiff was injured by a truck owned and operated by them, and was demanding damages, where they refused to accept registered mail in order to avoid service. Morrisey v. Crabtree, 143 F. Supp. 105 (1956).

Service under Federal Rule.—If the requirements of this section and § 1-105.1 are met, service under Rule 4 of the federal Rules of Civil Procedure is valid. Denton v. Ellis, 258 F. Supp. 223 (E.D.N.C. 1966).

Section 1-108 Unavailable to Motorist Served under This Section.—See note to § 1-108.

Amendment of Process and Pleading.—When the procedural requirements of this section are strictly complied with, the process and pleading are subject to amendment in accordance with general rules. Carolina Plywood Distribs., Inc. v. McAndrews, 270 N.C. 91, 153 S.E.2d 770 (1967).

Service Held Sufficient.—

Where defendant refused to accept a copy of the complaint and summons, because the word "Jr." was not included after his name, the Supreme Court held that the suffix, "Jr.," is no part of a person's name; it is a mere descriptio personae; names are to designate persons, and where the identity is certain a variance in the name is immaterial. Sink v. Schafer, 266 N.C. 347, 145 S.E.2d 860 (1966).

Finding of Nonresidence Conclusive on Appeal.—The finding of the trial court that defendants were nonresidents on the date of the automobile collision in suit, and were, therefore, subject to service under this section, is conclusive on appeal if such finding is supported by evidence. Hart v. Queen City Coach Co., 241 N. C. 389, 85 S. E. (2d) 319 (1955).

Evidence Sufficient to Show Control by Nonresident. — See Davis v. Martini, 233 N. C. 351, 64 S. E. (2d) 1 (1951).

Findings of Fact Sufficient to Support Service under This Section.—See Winborne v. Stokes, 238 N. C. 414, 78 S. E. (2d) 171 (1953).

Motion to Quash Service Denied. — Where, in an action against a nonresident bus owner to recover for the negligent operation of a bus in this State, service on the nonresident was had by service on the Commissioner of Motor Vehicles, the nonresident's motion to quash the service should be denied when the nonresident offered no evidence in support of its allegations that it had leased the bus to be operated solely by and under the exclusive control of a resident corporation and under the resident corporation's franchise right.

Israel v. Baltimore & A.R.R., 262 N.C. 83, 136 S.E.2d 248 (1964).

Applied in Todd v. Thomas, 202 F. Supp. 45 (1962).

Cited in Nationwide Mut. Ins. Co. v. Roberts, 261 N.C. 285, 134 S.E.2d 654 (1964).

§ 1-105.1. Service on residents who establish residence outside the State and on residents who depart from the State. The provisions of § 1-105 of this chapter shall also apply to a resident of the State at the time of the accident or collision who establishes residence outside the State subsequent to the accident or collision and to a resident of the State at the time of the accident or collision who departs from the State subsequent to the accident or collision and remains absent therefrom for sixty (60) days or more, continuously whether such absence is intended to be temporary or permanent. (1955 c. 232.)

Cross Reference.—See note to § 1-105.

Domicile in the State is alone sufficient to bring an absent defendant within the reach of the State's jurisdiction for purposes of a personal judgment by means of appropriate substituted service, provided proper notice and opportunity for hearing were given. Denton v. Ellis, 258 F. Supp. 223 (E.D.N.C. 1966).

Cited in Nationwide Mut. Ins. Co. v. Roberts, 261 N.C. 285, 134 S.E.2d 654 (1964); Harrison v. Hanvey, 265 N.C. 243, 143 S.E.2d 593 (1965); Byrd v. Pawlick, 362 F.2d 390 (4th Cir. 1966).

§ 1-106. Record of such processes; delivery of return.

Cited in Foster v. Holt, 237 N. C. 495, 75 S. E. (2d) 319 (1953); Byrd v. Piedmont Aviation, Inc., 256 N. C. 684, 124 S. E. (2d) 880 (1962).

§ 1-107. Alternative method of service upon nonresident defendants.

Residence of defendant at time of accident controls the application of §§ 1-105 and 1-105.1 and this section under federal Rule 4 (d) 7. Denton v. Ellis, 258 F. Supp. 223 (E.D.N.C. 1966).

§ 1-107.2. Service upon nonresident operators of watercraft and upon their personal representatives.—(a) The operation, navigation or maintenance by a nonresident or nonresidents of a boat, ship, barge or other watercraft in the State, either in person or through others, and the acceptance thereby by such nonresident or nonresidents of the protection of the laws of the State for such watercraft, or the operation, navigation or maintenance by a nonresident or nonresidents of a boat, ship, barge or other watercraft in the State, either in person or through others, other than under the laws of the State, shall be deemed equivalent to an appointment by each such nonresident of the Secretary of State or his successor in office, to be the true and lawful attorney of each such nonresident and the true and lawful attorney of the executor or administrator of each such nonresident for service of process, upon whom may be served all lawful process in any suit, action or proceeding against such nonresident or nonresidents growing out of any accident or collision in which such nonresident or nonresidents may be involved while, either in person or through others, operating, navigating, or maintaining a boat, ship, barge or other watercraft in the State; and such acceptance or such operating, navigating or maintaining in the State of such watercraft shall be a signification of each such nonresident's agreement that any such process against him or his administrator or executor which is so served shall be of the same legal force and effect as if served on him personally.

(b) Service of such process shall be made in the following manner:

(1) By leaving a copy therefor, with a fee of one dollar ($1.00) in the hands of the Secretary of State, or in his office. Such service, upon compliance with the other provisions of this section shall be sufficient service upon said nonresident.

(2) Notice of such service of process and copy thereof must be forthwith sent by registered mail by plaintiff or the Secretary of State to the defendant, and the entries on the defendant's return receipt shall be sufficient

evidence of the date on which notice of service upon the Secretary of State and copy of process were delivered to the defendant, on which date service on said defendant shall be deemed completed. If the defendant refuses to accept the registered letter, service on the defendant shall be deemed completed on the date of such refusal to accept as determined by the notations by the postal authorities on the original envelope, and if such date cannot be so determined, then service shall be deemed completed on the date that the registered letter is returned to the plaintiff or the Secretary of State, as determined by the postal marks on the original envelope.

(3) The defendant's return receipt, or the original envelope bearing a notation by the postal authorities that receipt was refused, and an affidavit by the plaintiff that notice of mailing the registered letter and refusal to accept was forthwith sent to the defendant by ordinary mail, together with the plaintiff's affidavit of compliance with the provisions of this section must be appended to the summons or other process and filed with said summons, complaint and other papers in the cause.

Provided, that where the nonresident watercraft operator has died prior to the commencement of an action brought pursuant to this section, service of process shall be made on the executor or administrator of such nonresident watercraft operator in the same manner and on the same notice as if provided in the case of a nonresident watercraft operator.

The court in which the action is pending shall order such continuance as may be necessary to afford the defendant reasonable opportunity to defend the action.

(c) The provisions of this section shall also apply to a resident of the State at the time of the accident or collision who establishes residence outside the State subsequent to the accident or collision and to a resident of the State at the time of the accident or collision who departs from the State subsequent to the accident or collision and remains absent therefrom for sixty (60) days or more, continuously, whether such absence is intended to be temporary or permanent.

(d) The provisions of this section shall not apply to any boat, ship, barge, or other watercraft having a valid marine document issued by the United States or a foreign government. (1961, cc. 661, 1202.)

Editor's Note.—Session Laws 1961, c. 1202, added subsection (d).

§ 1-107.3. Service upon nonresident operators of aircraft and upon their personal representatives.—(a) The operation, navigation or maintenance by a nonresident or nonresidents of an airplane, helicopter, glider, dirigible, blimp, balloon, or other aircraft in the State, either in person or through others, and the acceptance thereby by such nonresident or nonresidents of the protection of the laws of the State for such aircraft, or the operation, navigation or maintenance by a nonresident or nonresidents of an airplane, helicopter, glider, dirigible, blimp, balloon, or other aircraft in the State, either in person or through others, other than under the laws of the State, shall be deemed equivalent to an appointment by each such nonresident of the Secretary of State or his successor in office, to be the true and lawful attorney of each such nonresident and the true and lawful attorney of the executor or administrator of each such nonresident for service of process, upon whom may be served all lawful process in any suit, action or proceeding against such nonresident or nonresidents growing out of any accident or collision in which such nonresident or nonresidents may be involved while, either in person or through others, operating, navigating, or maintaining an airplane, helicopter, glider, dirigible, blimp, balloon, or other aircraft in the State; and such acceptance or such operation, navigating or maintaining in the State of such aircraft shall be a signification of each such nonresident's agreement that any such process against him or his admin-

istrator or executor which is so served shall be of the same legal force and effect as if served on him personally.

(b) Service of such process shall be made in the following manner:

(1) By leaving a copy therefor, with a fee of one dollar ($1.00) in the hands of the Secretary of State, or in his office. Such service, upon compliance with the other provisions of this section shall be sufficient service upon said nonresident.

(2) Notice of such service of process and copy thereof must be forthwith sent by registered mail by plaintiff or the Secretary of State to the defendant, and the entries on the defendant's return receipt shall be sufficient evidence of the date on which notice of service upon the Secretary of State and copy of process were delivered to the defendant, on which date service on said defendant shall be deemed completed. If the defendant refuses to accept the registered letter, service on the defendant shall be deemed completed on the date of such refusal to accept as determined by the notations by the postal authorities on the original envelope, and if such date cannot be so determined, then service shall be deemed completed on the date that the registered letter is returned to the plaintiff or the Secretary of State as determined by the postal marks on the original envelope.

(3) The defendant's return receipt, or the original envelope bearing a notation by the postal authorities that receipt was refused, and an affidavit by plaintiff that notice of mailing the registered letter and refusal to accept was forthwith sent to the defendant by ordinary mail, together with the plaintiff's affidavit of compliance with the provisions of this section must be appended to the summons or other process and filed with said summons, complaint and other papers in the cause.

Provided, that where the nonresident aircraft operator has died prior to the commencement of an action brought pursuant to this section, service of process shall be made on the executor or administrator of such nonresident aircraft operator in the same manner and on the same notice as if provided in the case of a nonresident aircraft operator.

The court in which the action is pending shall order such continuance as may be necessary to afford the defendant reasonable opportunity to defend the action.

(c) The provisions of this section shall also apply to a resident of the State at the time of the accident or collision who establishes residence outside the State subsequent to the accident or collision and to a resident of the State at the time of the accident or collision who departs from the State subsequent to the accident or collision and remains absent therefrom for sixty (60) days or more, continuously, whether such absence is intended to be temporary or permanent. (1963, c. 1088.)

§ 1-108. Defense after judgment on substituted service.

Legislative Policy.—This section is indicative of legislative policy not to bar claimants to a fund by service of process by publication, when they may be accorded their just rights without injuriously affecting innocent parties. American Bridge Division United States Steel Corp. v. Brinkley, 255 N. C. 162, 120 S. E. (2d) 529 (1961).

Relief After Judgment Not Available to Persons Served Under §§ 1-104 through 1-107.1.—This section having referred to service under §§ 1-104 through 1-107.1 in which relief could be granted before judgment, and omitted service under these sections in the clause for relief after judgment, and having made the latter clause applicable to service against whom publication is ordered, the conclusion is inescapable that the relief after judgment was not available to persons served under §§ 1-104 through 1-107.1.

Morrisey v. Crabtree, 143 F. Supp. 105 (1956).

This section, in respect of relief after judgment, applies only when the service is by publication, and therefore is unavailable to a nonresident motorist served under § 1-105, which provides that such service shall be of the same legal force as personal service. Franks v. Jenkins, 247 N. C. 586, 101 S. E. (2d) 423 (1958).

Section Relates Only to Defendant against Whom Publication Is Ordered.—By express language this section relates only to "the defendant against whom publication is ordered," and to give the statute an interpretation contrary to its express language binding on one not within the class named in the order of publication, would render it void as violative of Const., Art. I, § 17. Sutton v. Davenport, 258 N. C. 27, 128 S. E. (2d) 16 (1962).

Applied in Harris v. Chapman, 238 N. C. 308, 77 S. E. (2d) 658 (1953).

ARTICLE 9.

Prosecution Bonds.

§ 1-109. Plaintiff's, for costs.—At any time after the issuance of summons, the clerk or judge, upon motion of the defendant, shall require the plaintiff to do one of the following things and the failure to comply with such order within thirty days from the date thereof shall constitute grounds for dismissal of such civil action or special proceeding:

(1) Give an undertaking with sufficient surety in the sum of two hundred dollars, with the condition that it will be void if the plaintiff pays the defendant all costs which the latter recovers of him in the action.

(2) Deposit two hundred dollars with him as security to the defendant for these costs, in which event the clerk must give to the plaintiff and defendant a certificate to that effect.

(3) File with him a written authority from a judge or clerk of a superior court, authorizing the plaintiff to sue as a pauper: Provided, however, that the requirements of this section shall not apply to the State of North Carolina or any of its agencies, commissions or institutions, or to counties, drainage districts, cities and towns; provided, further, that the State of North Carolina or any of its agencies, commissions or institutions, and counties, drainage districts, cities and towns may institute civil actions and special proceedings without being required to give a prosecution bond or make deposit in lieu of bond. (R. C., c. 31, s. 40; C. C. P., s. 71; Code, s. 209; Rev., s. 450; C. S., s. 493; 1935, c. 398; 1949, c. 53; 1955, c. 10, s. 1; 1957, c. 563; 1961, c. 989.)

Local Modification.—Mecklenburg: 1955, c. 877; Union: 1961, c. 506.

Editor's Note.—The 1955 amendment inserted in subsection (3) the references to "the State of North Carolina or any of its agencies, commissions or institutions." Section 2 of the amendatory act made it applicable to pending litigation, and provided that all actions or proceedings heretofore instituted by the State or its agencies shall be valid as if its provisions had at all times been the law of the land.

The 1957 amendment inserted "drainage districts" after "counties" in lines five and seven of subsection (3).

The 1961 amendment rewrote the part of this section preceding subdivision 1.

§ 1-111. Defendant's, for costs and damages in actions for land.

Purpose of Section.—The plain purpose of this section is to assure the plaintiff that he will suffer no damages during such period as he may be wrongfully deprived of possession Morris v. Wilkins, 241 N. C. 507, 85 S. E. (2d) 892 (1955).

The word "defendant" was not intended to comprehend the State or its agencies. Kistler v. City of Raleigh, 261 N.C. 775, 136 S.E.2d 78 (1964).

A municipality is not required to file bond in defending an action for the possession of real property, since this section

does not apply to the State or its agencies. Kistler v. City of Raleigh, 261 N.C. 775, 136 S.E.2d 78 (1964).

Failure to Give Undertaking—When No Objection Made.—

See Rich v. Norfolk Southern Ry. Co., 244 N. C. 175, 92 S. E. (2d) 768 (1956).

Same—Waiver.—

In accord with original. See Sisk v. Perkins, 264 N.C. 43, 140 S.E.2d 753 (1965).

The provisions of this section and § 1-112 are subject to be waived unless seasonably insisted upon by the plaintiff. Motley v. Thompson, 259 N. C. 612, 131 S. E. (2d) 447 (1963).

The statutory requirement of bond in actions in ejectment may be waived, and therefore in plaintiffs' action in trespass in which defendants file a counterclaim in ejectment, judgment by default in favor of defendants on the counterclaim for want of a bond is properly set aside when plaintiffs file a reply to the counterclaim and raise no objection based on want of bond until some weeks thereafter when, without notice to plaintiffs, they move for default judgment before the clerk. Motley v. Thompson, 259 N. C. 612, 131 S. E. (2d) 447 (1963).

Sufficiency of Bond Is "Matter Included in the Action".—See note under § 1-294

The bond required by this section does not apply to a defendant who is not in possession of the land in controversy. Hence, this section does not apply to an action by a plaintiff in possession to remove a cloud from his title. Nor does it apply to an action to establish a parol trust and to have defendant render an accounting as mortagee in possession. Nor does it apply to a special proceeding under G. S. § 38-1 et seq. to establish the location of a boundary line. The decisions point towards a restriction of its application to actions in ejectment, the defendant being in possession when the action is commenced. Morris v. Wilkins, 241 N. C. 507, 85 S. E. (2d) 892 (1955).

This section and § 1-112 do not apply unless the party against whom relief is demanded is in possession of the property, and therefore when motion to strike a cross action on ground of want of bond is denied, it will be assumed, in the absence of findings of record, that the court found, in accordance with allegations in the pleadings, that the parties against whom the relief was demanded were not in possession. Motley v. Thompson, 259 N. C. 612, 131 S. E. (2d) 447 (1963).

Bond Not Required in Absence of Allegation That Defendant Is in Actual Possession.—In an action for damages for trespass upon realty in which there is no allegation to the effect that the defendant is in actual possession of the property or any part thereof, the defendant is not required to post bond before answering, as required by this section and § 1-211, subsection 4. Wilson v. Chandler, 238 N. C. 401, 78 S. E. (2d) 155 (1953).

§ 1-112. Defense without bond.

Cited in Morris v. Wilkins, 241 N. C. 507, 85 S. E. (2d) 892 (1955); Sisk v. Perkins, 264 N.C. 43, 140 S.E.2d 753 (1965).

Article 10.

Joint and Several Debtors.

§ 1-113. Defendants jointly or severally liable.

At common law in actions ex contractu, the general rule is, if the contract be joint, the plaintiff must sue all the persons who either expressly or by implication of law made the contract. North State Fin. Co. v. Leonard, 263 N.C. 167, 139 S.E.2d 356 (1964).

Subdivision 1 applies to obligations that are joint only, not to obligations that are joint and several. North State Fin Co. v. Leonard, 263 N.C. 167, 139 S.E.2d 356 (1964).

Partners—In General.—

While a creditor and also each partner has a right to demand that partnership (joint) property be applied to the satisfaction of partnership debts, each partner is severally bound to the creditor for the full amount of his claim. North State Fin. Co. v. Leonard, 263 N.C. 167, 139 S.E.2d 356 (1964).

§ 1-114. Summoned after judgment; defense.

This section applies to obligations that are joint only, not to obligations that are joint and several. North State Fin. Co. v. Leonard, 263 N.C. 167, 139 S.E.2d 356 (1964).

§ 1-115. Pleadings and proceedings same as in action.

This section applies to obligations that are joint only, not to obligations that are joint and several. North State Fin. Co. v. Leonard, 263 N.C. 167, 139 S.E.2d 356 (1964).

ARTICLE 11.

Lis Pendens.

§ 1-116. Filing of notice of suit.—(a) Any person desiring the benefit of constructive notice of pending litigation must file a separate, independent notice thereof, which notice shall be cross-indexed in accordance with G. S. 1-117, in the following cases:

(1) Actions affecting title to real property;
(2) Actions to foreclose any mortgage or deed of trust or to enforce any lien on real property; and
(3) Actions in which any order of attachment is issued and real property is attached.

(b) Notice of pending litigation shall contain:

(1) The name of the court in which the section has been commenced or is pending;
(2) The names of the parties to the action;
(3) The nature and purpose of the action; and
(4) A description of the property to be affected thereby.

(c) Notice of pending litigation may be filed:

(1) At the time the summons is issued, subject to the provisions of G. S. 1-116.1 and G. S. 1-119;
(2) At or any time after the filing of the complaint;
(3) At or any time after real property has been attached; or
(4) At or any time after the filing of an answer or other pleading in which the pleading party alleges an affirmative cause of action falling within the provisions of subsection (a) of this section.

(d) Notice of pending litigation must be filed with the clerk of the superior court of each county in which any part of the real estate is located, not excepting the county in which the action is pending, in order to be effective against bona fide purchasers or lien creditors with respect to the real property located in such county. (C. C. P., s. 90; Code, s. 229; Rev., s. 460; 1917, c. 106; C. S., s. 500; 1949, c. 260; 1959, c. 1163, s. 1.)

Editor's Note.—
The 1959 amendment rewrote this section.

A Harsh Rule.—
In accord with original. See Cutter v. Cutter Realty Co., 265 N.C. 664, 144 S.E.2d 882 (1965).

The filing of lis pendens is authorized only in actions affecting the title to real property. Parker v. White, 235 N. C 680, 71 S. E. (2d) 122 (1952).

Under this section, a notice of lis pendens can be filed against real property only in an action affecting its title. McGurk v. Moore, 234 N. C. 248, 67 S. E. (2d) 53 (1951).

Or to Do One of Things Enumerated.—
Notice of lis pendens may not properly be filed except in an action, a purpose of which is to affect directly the title to the land in question or to do one of the other things mentioned in this section. Cutter v. Cutter Realty Co., 265 N.C. 664, 144 S.E.2d 882 (1965).

There can be no valid notice of lis pendens in this State except in one of the three

types of actions enumerated in subsection (a) of this section. Cutter v. Cutter Realty Co., 265 N.C. 664, 144 S.E.2d 882 (1965).

It Is Required When Claim Is in Derogation of Record. — The rule lis pendens applies in actions to set aside deeds or other instruments for fraud, to establish a constructive or resulting trust, to require specific performance, to correct a deed for mutual mistake and in like cases where there is no record notice and where otherwise a prospective purchaser would be ignorant of the claim. That is, lis pendens notice is required when the claim is contra or in derogation of the record. Cutter v. Cutter Realty Co., 265 N.C. 664, 144 S.E.2d 882 (1965).

The section is designed, etc.—

The effect of lis pendens and the effect of registration are in their nature the same thing. They are only different examples of instances of the operation of the rule of constructive notice. One is simply a record in one place and the other is a record in another place. Each serves its purpose in proper instances. They are each record notices. Cutter v. Cutter Realty Co., 265 N.C. 664, 144 S.E.2d 882 (1965).

Statutes Construed in Pari Materia.—The law of lis pendens and the statute requiring the registration of instruments affecting title to real property must be construed in pari materia. Otherwise, the one would be destructive of the other. Cutter v. Cutter Realty Co., 265 N.C. 664, 144 S.E.2d 882 (1965).

Modifies Common-Law Rule.—

The common-law rule of lis pendens has been replaced in North Carolina by the provisions of this article. Cutter v. Cutter Realty Co., 265 N.C. 664, 144 S.E.2d 882 (1965).

Action for Monetary Damages Not Included.—Where it is clear from a reading of the complaint, and the amendment thereto, that the action is one to recover monetary damages, the action is not one affecting the title to real property within the purview of this section. Parker v. White, 235 N. C. 680, 71 S. E. (2d) 122 (1952).

This section does not apply to an action the purpose of which is to secure a personal judgment for the payment of money even though such a judgment, if obtained and properly docketed, is a lien upon land of the defendant described in the complaint. Cutter v. Cutter Realty Co., 265 N.C. 664, 144 S.E.2d 882 (1965).

Nor Action to Prevent Change in Record.—An action brought for the purpose of preventing a change in the record and not for the purpose of establishing a trust or lien upon the property, is not an action of a type in which this section permits the filing of a notice of lis pendens. Cutter v. Cutter Realty Co., 265 N.C. 664, 144 S.E.2d 882 (1965).

Section Held Inapplicable.—See McLeod v. McLeod, 266 N.C. 144, 146 S.E.2d 65 (1966).

Cited in G. L. Wilson Bldg. Co. v. Leatherwood, 268 F. Supp. 609 (W.D.N.C. 1967).

§ 1-117. Cross-index of lis pendens.—Every notice of pending litigation filed under this article shall be cross-indexed by the clerk of the superior court in a record, called the "Record of Lis Pendens," to be kept by him pursuant to G. S. 2-42(6). (1903, c. 472; Rev., s. 464; 1919, c. 31; C. S., s. 501; 1959, c. 1163, s. 2.)

Editor's Note. — The 1959 amendment rewrote this section.

§ 1-118. Effect on subsequent purchasers.

Applied in Cutter v. Cutter Realty Co., 265 N.C. 664, 114 S.E.2d 882 (1965).

§ 1-120. Cancellation of notice.

Section Applies to Cancellation of Valid Notice. — The provisions of this section with reference to cancellation of a notice of lis pendens are applicable to the cancellation of a valid notice. Cutter v. Cutter Realty Co., 265 N.C. 664, 144 S.E.2d 882 (1965).

If a notice of lis pendens filed in the office of the clerk is not authorized by statute, a court has jurisdiction to cancel it, upon the motion of the owner of the record title to the land, without waiting for the termination of the action. Cutter v. Cutter Realty Co., 265 N.C. 664, 144 S.E.2d 882 (1965).

Cited in Parker v. White, 235 N. C. 680, 71 S. E. (2d) 122 (1952).

SUBCHAPTER VI. PLEADINGS.

ARTICLE 12.

Complaint.

§ 1-121. First pleading and its filing.—The first pleading on the part of the plaintiff is the complaint. It must be filed in the clerk's office at or before the time of the issuance of summons and a copy thereof delivered to the defendant, or defendants, at the time of the service of sumons, provided, that the clerk may at the time of the issuance of summons on application of plaintiff by written order extend the time for filing complaint to a day certain not to exceed twenty (20) days, and a copy of such order shall be delivered to the defendant, or defendants, at the time of the service of summons in lieu of a copy of the complaint: Provided further, said application and order shall state the nature and purpose of the suit. The clerk shall not extend the time for filing complaint beyond the time specified in such order; except that when application is made to the court, under article forty-six of this chapter, for leave to examine the defendant prior to filing complaint, and it shall be made to appear to the court that such examination of defendant is necessary to enable the plaintiff to file his complaint, and such examination is allowed, the clerk shall extend the time for filing complaint until twenty (20) days after the report of the examination is filed as required by § 1-568.21. When the complaint is not filed at the time of the issuance of the summons the clerk shall, when the complaint is filed, make an order directing the sheriff to serve a copy of such complaint on each of the defendants by delivery of a copy thereof to each of them, and the sheriff shall within twenty days make such service and make a written return, on the paper containing the order issued to him, showing the date of service and the date of return, or, if for any reason he is unable to make service, he shall show in his return the reason therefor. If the sheriff's return shows that service of copy of the complaint as provided above has not been made on a defendant because such defendant is not to be found in the county where the summons was originally served on him, and the plaintiff causes affidavit to be made and filed showing that such defendant cannot, after due diligence, be found in the State, it shall not be necessary to make, or attempt to make, service thereof on such defendant in any other manner. (C. C. P., s. 92; 1868-9, c. 76, s. 3; 1870-1, c. 42, s. 3; Code, ss. 206, 232, 238; Rev., ss. 465, 466; 1919, c. 304, s. 2; C. S., s. 505; 1927, c. 66, s. 3; 1949, c. 1113, s. 1; 1955, c. 527; 1957, c. 783, s. 2.)

Editor's Note.—The 1955 amendment, effective July 1, 1955, substituted "twenty" for "ten" in line twenty.

The 1957 amendment substituted "1-568.21" for "1-571" in line seventeen.

For case law survey on pleading and parties, see 41 N. C. Law Rev. 416; 43 N.C.L. Rev. 873 (1965); 44 N.C.L. Rev. 897 (1966).

The intent of this section was to require the plaintiff to alert the defendant by giving preliminary notice of the nature of the claim and the purpose of the suit, and that the ultimate factual averments would follow in a complaint later to be filed. Roberts v. Coca-Cola Bottling Co. of Asheville, 256 N. C. 434, 124 S. E. (2d) 105 (1962); Sharpe v. Pugh, 270 N.C. 598, 155 S.E.2d 108 (1967).

The language of this section is plain and unambiguous. Deanes v. Clark, 261 N.C. 467, 135 S.E.2d 6 (1964).

The power of the clerk to extend the time for filing complaint is clearly limited by this section. Deanes v. Clark, 261 N.C. 467, 135 S.E.2d 6 (1964).

But Section Does Not Limit Power of Judge.—Since this section mentions only the clerk, and the well-established general rule is that the judge has inherent discretionary power to permit plaintiff to file a complaint after expiration of statutory time or to permit untimely pleadings to be filed, this section does not affect the discretionary power of the judge. Deanes v. Clark, 261 N.C. 467, 135 S.E.2d 6 (1964).

Until the cause is at issue the clerk acts for the court, and his powers and duties

are not to be confused with those of the judge who has wide discretionary powers of amendment not given to the clerk. Roberts v. Coca-Cola Bottling Co. of Asheville, 256 N. C. 434, 124 S. E. (2d) 105 (1962).

Sufficiency of Application for Extension. —The statement in an application for extension of time to file complaint that the nature and purpose of the action was to recover damages for the wrongful death of plaintiff's intestate resulting from the defendant doctor's negligence in the care and treatment of intestate was sufficient to entitle plaintiff to allege both an action for wrongful death and an action for pain and suffering endured by intestate from the time of injury until death, since defendant could not have been taken by surprise by the assertion of the separate claim for pain and suffering. Sharpe v. Pugh, 270 N.C. 598, 155 S.E.2d 108 (1967).

Failure of Clerk to Make Order or Sheriff to Serve Complaint. — Construing this section with § 1-125 it is obvious it was not the intent of the legislature that failure of the clerk to make the order or the sheriff to serve a copy of a complaint which has been filed in apt time, should necessitate dismissal of the action, but rather that the defendant would not be required to plead until 30 days after the date of the sheriff's return showing that service was not made of such complaint pursuant to this section. Braswell v. Atlantic Coast Line R. Co., 233 N. C. 640, 65 S. E. (2d) 226 (1951).

Delivery of Summons and Complaint to Defendants.—Delivery of copy of summons and the complaint to the male defendant with instructions to him to deliver it to the feme defendant, his wife, is not valid service on the feme. Harrington v. Rice, 245 N. C. 640, 97 S. E. (2d) 239 (1957).

The delivery of copies of the summons and order extending time for the delayed filing, and the complaint, when filed, complete the service and give the court jurisdiction of the defendant. Roberts v. Coca-Cola Bottling Co. of Asheville, 256 N. C. 434, 124 S. E. (2d) 105 (1962).

Applied in Roberts v. Coca-Cola Bottling Co. of Asheville, Inc., 257 N. C. 656, 127 S. E. (2d) 236 (1962).

Cited in Pate v. R. L. Pittman Hospital, Inc., 234 N. C. 637, 68 S. E. (2d) 288 (1951); Pruitt v. Taylor, 247 N. C. 380, 100 S. E. (2d) 841 (1957); Collins v. Simms, 254 N. C. 148, 118 S. E. (2d) 402 (1961); Myrtle Apartments, Inc. v. Lumbermen's Mut. Cas. Co., 258 N. C. 49 127 S. E. (2d) 759 (1962); Williams v. Denning, 260 N.C. 539, 133 S.E.2d 150 (1963).

§ 1-122. Contents.

I. IN GENERAL.

Editor's Note. — For article on pleading damages in North Carolina, see 31 N. C. Law Rev. 250.

For case law survey on pleading and parties, see 43 N.C.L. Rev. 873 (1965).

The requirement of this section is that the complaint must give the title, the court, the county, the parties, and a plain and concise statement of the facts constituting a cause of action without unnecessary repetition; and each material allegation must be separately numbered. Dowd v. Charlotte Pipe & Foundry Co., 263 N.C. 101, 139 S.E.2d 10 (1964).

The function of a pleading is to inform an adversary what facts are claimed to constitute a cause of action. Sorrell v. Moore, 251 N. C. 852, 112 S. E. (2d) 254 (1960).

The function of a complaint is not the narration of the evidence, but the statement of the substantive and constituent facts upon which the plaintiff's claim to relief is based. Johnson v. Johnson, 259 N. C. 430, 130 S. E. (2d) 876 (1963). citing Guy v. Baer, 234 N. C. 276, 67 S. E. (2d) 47 (1951); Brewer v. Elks, 260 N.C. 470, 133 S.E.2d 159 (1963).

A complaint's purpose is to give the opposing party notice of the facts on which plaintiff relies to establish liability. Green v. Isenhour Brick & Tile Co., 263 N.C. 503, 139 S.E.2d 538 (1965).

Sufficiency of Complaint.—If the complaint gives notice of the facts asserted for the cause of action, it has served its purpose. Sorrell v. Moore, 251 N. C. 852, 112 S. E. (2d) 254 (1960).

Complaint held insufficient under this section. See Belch v. Perry, 240 N. C. 764, 84 S. E. (2d) 186 (1954).

Applied in Shepard v. Rheem Mfg. Co., 251 N. C. 751, 112 S. E. (2d) 380 (1960); Wyatt v. North Carolina Equipment Co., 253 N. C. 355, 117 S. E. (2d) 21 (1960); Bryant v. Occidental Life Ins. Co., 253 N. C. 565, 117 S. E. (2d) 435 (1960); Williams v. Wallace, 260 N.C. 537, 133 S.E.2d 178 (1963); Crouch v. Lowther Trucking Co., 262 N.C. 85, 136 S.E.2d 246 (1964); Kearns v. Primm, 263 N.C. 423, 139 S.E.2d 697 (1965); Eastern Conference of Original Free Will Baptists v. Piner,

267 N.C. 74, 147 S.E.2d 581 (1966); D.C. Standard Homes Co. v. N.C. Standard Homes Co., 271 N.C. 181, 155 S.E.2d 768 (1967).

Quoted in Pruitt v. Taylor, 247 N. C. 380, 100 S. E. (2d) 841 (1957); Batts v. Batts, 248 N. C. 243, 102 S. E. (2d) 862 (1958); Nye v. Pure Oil Co., 257 N. C. 477, 126 S. E. (2d) 48 (1962).

Cited in Stamey v. Rutherfordton Electric Membership Corp., 249 N. C. 90, 105 S. E. (2d) 282 (1958); Spaugh v. Winston-Salem, 249 N. C. 194, 105 S. E. (2d) 610 (1958); Broadway v. Asheboro, 250 N. C. 232, 108 S. E. (2d) 441 (1959); State v. Bisette, 250 N. C. 514, 108 S. E. (2d) 858 (1959); Smith v. Moore, 254 N. C. 186, 118 S. E. (2d) 436 (1961); Barbour v. Carteret County, 255 N. C. 177, 120 S. E. (2d) 448 (1961); Morton v. Thornton, 257 N. C. 259, 125 S. E. (2d) 464 (1962); Accident Indem. Ins. Co. v. Johnson, 261 N.C. 778, 136 S.E.2d 95 (1964); Paul v. Piner, 271 N.C. 123, 155 S.E.2d 526 (1967).

III. STATEMENT OF FACTS CONSTITUTING THE CAUSE OF ACTION.

Provisions of Section, etc.—

The requirement of this section is not mere matter of form. It is of the essential substance of the litigation. Dowd v. Charlotte Pipe & Foundry Co., 263 N.C. 101, 139 S.E.2d 10 (1964).

This section is specific in directing "a plain and concise statement of the facts constituting a cause of action, without unnecessary repetition" when drafting a complaint. Etheridge v. Carolina Power & Light Co., 249 N. C. 367, 106 S. E. (2d) 560 (1959).

The cardinal requirement of this section is that the facts constituting a cause of action, rather than the conclusions of the pleader, must be set out in the complaint, so as to disclose the issuable facts determinative of the plaintiff's right to relief. Shives v. Sample, 238 N. C. 724, 79 S. E. (2d) 193 (1953); Gillispie v. Goodyear Service Stores, 258 N. C. 487, 128 S. E. (2d) 762 (1963).

A complaint must be fatally defective before it will be rejected as insufficient, and if to any extent it presents facts sufficient to constitute a cause of action the pleading will stand. Gillispie v. Goodyear Service Stores, 258 N. C. 487, 128 S. E. (2d) 762 (1963).

But Court May Not Read into Complaint Allegations Which Are Not There.—The rule of liberal construction does not require or permit the court to write in the complaint allegations which are not there. Brevard v. State Farm Mut. Auto. Ins. Co., 262 N.C. 458, 137 S.E.2d 837 (1964).

Defendant Must Not Be Left in Doubt.—

In accord with original. See Bowen v. Darden, 233 N. C. 443, 64 S. E. (2d) 285 (1951); Parker v. White, 237 N. C. 607, 75 S. E. (2d) 615 (1953).

The cause of action consists of the facts alleged. Skipper v. Cheatham, 249 N. C. 706, 107 S. E. (2d) 625 (1959); Wyatt v. North Carolina Equipment Co., 253 N. C. 355, 117 S. E. (2d) 21 (1960); Bryant v. Occidental Life Ins. Co., 253 N. C. 565, 117 S. E. (2d) 435 (1960); Gillispie v. Goodyear Service Stores, 258 N. C. 487, 128 S. E. (2d) 762 (1963); Copple v. Warner, 260 N.C. 727, 133 S.E.2d 641 (1963); Philbrook v. Chapel Hill Housing Authority, 269 N.C. 598, 153 S.E.2d 153 (1967).

A cause of action consists of the facts alleged in the complaint, and plaintiff must allege such facts necessary to constitute his cause of action so as to disclose the issuable facts determinative of plaintiff's right to relief. Brevard v. State Farm Mut. Auto. Ins. Co., 262 N.C. 458, 137 S.E.2d 837 (1964).

The complaint must allege every fact necessary to constitute a cause of action. Wells v. Clayton, 236 N. C. 102, 72 S. E. (2d) 16 (1952).

And Facts Not Pleaded Cannot Be Shown.—A party is not permitted to show facts constituting a cause of action which he has not pleaded. Sorrell v. Moore, 251 N. C. 852, 112 S. E. (2d) 254 (1960).

A plain and concise statement, etc.—

In accord with 3rd paragraph in original. See King v. Sloan, 261 N.C. 562, 135 S.E.2d 556 (1964).

A cause of action upon which a plaintiff chooses to rely should be stated in the complaint in a clear and concise manner, so that the defendants will not be left in doubt as to how to answer and what defense to make. Brevard v. State Farm Mut. Auto. Ins. Co., 262 N.C. 458, 137 S.E.2d 837 (1964).

Material and Essential, Rather than Collateral or Evidential Facts, etc.—

The function of a complaint is not the narration of the evidence but the statement of the substantive and constituent facts upon which the plaintiffs' claim to relief is founded. Hence, the "facts constituting a cause of action" required by this section are the material, essential, and ultimate facts which constitute the cause of action—but not the evidence to prove them. With few exceptions only the facts to which the pertinent legal or equitable principles of

law are to be applied are to be stated in the complaint. Guy v. Baer, 234 N. C. 276, 67 S. E. (2d) 47 (1951); Parker v. White, 237 N. C. 607, 75 S. E. (2d) 615 (1953).

The statutory requirement is that a complaint must allege the material, essential and ultimate facts upon which plaintiff's right of action is based. Gillispie v. Goodyear Service Stores, 258 N. C. 487, 128 S. E. (2d) 762 (1963).

A complaint should not allege the evidentiary facts required to prove the existence of the ultimate facts. Tart v. Register, 257 N. C. 161, 125 S. E. (2d) 754 (1962).

The complaint should not delineate evidentiary facts. Green v. Isenhour Brick & Tile Co., 263 N.C. 503, 139 S.E.2d 538 (1965).

It is only required that a complaint contain a concise statement of the ultimate facts constituting the cause of action. Tart v. Register, 257 N. C. 161, 125 S. E. (2d) 754 (1962).

The function of a complaint is to state the ultimate facts which constitute the cause of action, but not the evidence to prove them. Rushing v. Polk, 258 N. C. 256, 128 S. E. (2d) 675 (1962).

To Which Pertinent Principles of Law Are to Be Applied.—Only facts to which the pertinent legal or equitable principles of law are to be applied should be stated in the complaint. Tart v. Register, 257 N. C. 161, 125 S. E. (2d) 754 (1962).

Facts Must Be Stated, etc.—

The facts alleged, but not the pleader's legal conclusions, are deemed admitted where the sufficiency of a complaint is is tested by demurrer. Wyatt v. North Carolina Equipment Co., 253 N. C. 355, 117 S. E. (2d) 21 (1960); Copple v. Warner, 260 N.C. 727, 133 S.E.2d 641 (1963).

Where the complaint merely alleges conclusions and not facts, it fails to state a cause of action and is demurrable. Gillispie v. Goodyear Service Stores, 258 N. C. 487, 128 S. E. (2d) 762 (1963).

A complaint which is a mixture of asserted facts and conclusions is not a "plain and concise statement of the facts constituting a cause of action." Walker v. Nicholson, 257 N. C. 744, 127 S. E. (2d) 564 (1962).

Where the pleadings and the amendments thereto are almost interminable and allege evidentiary matters and conclusions rather than facts, they do not conform with the requirements of good pleadings within the meaning of this section. Leggett v. Smith-Douglass Co., Inc., 257 N. C. 646, 127 S. E. (2d) 222 (1962).

Only Facts Properly Pleaded Will Be Considered.—On demurrer only facts properly pleaded are to be considered; legal inferences and conclusions of the pleader, if stated in the complaint, are to be disregarded. Dixie Fire & Cas. Co. v. Esso Standard Oil Co., 265 N.C. 121, 143 S.E.2d 279 (1965).

Demurrer Admits Facts Alleged but Not Conclusions.—The facts alleged, but not the pleader's conclusions, are deemed admitted where the sufficiency of a complaint is tested by demurrer. Philbrook v. Chapel Hill Housing Authority, 269 N.C. 598, 153 S.E.2d 153 (1967).

The pleadings must raise the precise issues which are to be submitted to the jury so that the court itself may not be left in a quandary as to the cause of action it is trying. Brevard v. State Farm Mut. Auto. Ins. Co., 262 N.C. 458, 137 S.E.2d 837 (1964).

Plaintiff Should State Grounds of Action and Defendant Should State Grounds of Defense.—Reason and common justice, as well as this section, require that the plaintiff shall state in a plain, strong, intelligible manner his grounds of action, and that the defendant shall in like manner state the grounds of his defense, and any counterclaims or demands he may have and desires to set up. Dowd v. Charlotte Pipe & Foundry Co., 263 N.C. 101, 139 S.E.2d 10 (1964).

The plaintiff should state the relief to which his allegations of fact entitle him. In a few simple words the pleadings should pinpoint the controversy and disclose the proper issues for its determination. It is the duty of plaintiff's counsel to follow the statutory requirement in preparing the complaint. Dowd v. Charlotte Pipe & Foundry Co., 263 N.C. 101, 139 S.E.2d 10 (1964).

Recovery must be had, if at all, on the theory of liability set forth in the complaint. Mere allegation of the legal conclusion which the pleader conceives should be drawn from the evidence he intends to offer is insufficient. Brevard v. State Farm Mut. Auto. Ins. Co., 262 N.C. 458, 137 S.E.2d 837 (1964).

Facts May Be Based on Knowledge or on Information and Belief.—The plaintiff may allege facts based on actual knowledge, or upon information and belief. Myrtle Apartments, Inc. v. Lumbermen's Mut. Cas. Co., 258 N. C. 49, 127 S. E. (2d) 759 (1962).

When a plaintiff alleges he does not have sufficient knowledge or information to form a belief as to particulars, he disqualifies

himself to allege them as facts. Myrtle Apartments, Inc. v. Lumbermen's Mut. Cas. Co., 258 N. C. 49, 127 S. E. (2d) 759 (1962).

It is not necessary to plead the law. The law arises upon the facts alleged, and the Court is presumed to know the law. Moore v. WOOW, Inc., 253 N. C. 1, 116 S. E. (2d) 186 (1960).

Allegation as to Unlawful and Unreasonable Regulations.—In an action to enjoin the enforcement of unreasonable regulations of a cemetery corporation, an allegation that the regulations adopted by the corporation set out in the complaint and still others not set out are unlawful and unreasonable, is totally inadequate, for plaintiff must allege plainly and concisely the regulations he contends are unlawful and unreasonable. Mills v. Carolina Cemetery Park Corp., 242 N. C. 20, 86 S. E. (2d) 893 (1955).

Allegation of Indebtedness.—When a complaint alleges defendant is indebted to plaintiff in a certain amount and such debt is due, but does not allege in what manner or for what cause defendant became indebted to plaintiff, it is demurrable for failure to state facts sufficient to constitute a cause of action. Gillispie v. Goodyear Service Stores, 258 N. C. 487, 128 S. E. (2d) 762 (1963).

Allegations of Negligence and Proximate Cause.—In an action or defense based upon negligence, it is not sufficient to allege the mere happening of an event of an injurious nature and call it negligence on the part of the party sought to be charged. This is necessarily so because negligence is not a fact in itself, but is the legal result of certain facts. Therefore, the facts which constitute the negligence charged and also the facts which establish such negligence as the proximate cause, or as one of the proximate causes, of the injury must be alleged. Gillispie v. Goodyear Service Stores, 258 N. C. 487, 128 S. E. (2d) 762 (1963).

Allegations of Trespass, Assault and False Imprisonment.—Where the plaintiff alleged, in a single sentence, that defendant "without cause or just excuse and maliciously" trespassed upon premises occupied by her as a residence, assaulted her and caused her to be seized and confined as a prisoner, the complaint stated no facts upon which these legal conclusions could be predicated. Plaintiff's allegations did not disclose what occurred, when it occurred, where it occurred, who did what, the relationships between defendants and plaintiff or of defendants inter se, or any other factual data that might identify the occasion or describe the circumstances of the alleged wrongful conduct of defendants. Gillispie v. Goodyear Service Stores, 258 N. C. 487, 128 S. E. (2d) 762 (1963).

Statement Held Insufficient. — Complaint held not to contain the plain and concise statement of facts contemplated by this statute. Davis v. Davis, 246 N. C. 307, 98 S. E. (2d) 318 (1957).

IV. DEMAND FOR RELIEF.

But Relief Is Granted, etc.—

A prayer for relief is not a necessary part of the complaint. Fremont City Board of Education v. Wayne County Board of Education, 259 N. C. 280, 130 S. E. (2d) 408 (1963).

What Determines the Measure, etc.—

Relief will be granted as warranted by the allegations and proof. Fremont City Board of Education v. Wayne County Board of Education, 259 N. C. 280, 130 S. E. (2d) 408 (1963).

§ 1-123. What causes of action may be joined.

I. IN GENERAL.

Editor's Note.—

For article on permissive joinder of parties and causes, see 34 N. C. Law Rev. 405.

For case law survey on pleading and parties, see 41 N. C. Law Rev. 416; 43 N.C.L. Rev. 873 (1965).

For case law survey as to commingling causes of action, see 44 N.C.L. Rev. 905 (1966).

Same — Section Relating to Counterclaim. —

In accord with original. See Thompson v. Pilot Life Ins. Co., 234 N. C. 434, 67 S. E. (2d) 144 (1951); Burton v. Dixon, 259 N. C. 473, 131 S. E. (2d) 27 (1963).

As the purpose of subsection 1 of this section and subsection 1 of § 1-137 is to authorize the litigation of all questions arising out of any one transaction, or series of transactions concerning the same subject matter, in one and the same action, and not to permit multifariousness, it must appear that there is but one subject of controversy. Standard Amusement Co. v. Tarkington, 247 N. C. 444, 101 S. E. (2d) 398 (1958).

This Section Should Be Liberally Construed, etc.—

In accord with original. See Arcady Farms Milling Co. v. Wallace, 242 N. C. 686, 89 S. E. (2d) 413 (1955).

This section will be liberally construed

to effectuate its purpose for the judicial determination of actions with reasonable promptness and a minimum of cost to the litigants. Conger v. Travelers Ins. Co., 260 N. C. 112, 131 S. E. (2d) 889 (1963).

Section Mandatory as to Causes Enumerated.—The provisions of this section as to what causes of action may be joined in the complaint are mandatory and not directory. Gaines v. Atlas Plywood Corp., 253 N. C. 191, 116 S. E. (2d) 427 (1960), citing Eller v. Carolina & N. W. R. Co., 140 N. C. 140, 52 S. E. 305 (1905).

Joinder Not Mandatory, etc.—
In accord with original. See Reid v. Holden, 242 N. C. 408, 88 S. E. (2d) 125 (1955).

This Section Limits §§ 1-69 and 1-73.— See notes under §§ 1-69 and 1-73.

Provision Requiring Each Cause of Action to Be Stated Separately.—
In accord with 1st paragraph in original. See National Ass'n for Advancement of Colored People v. Eure, 245 N. C. 331, 95 S. E. (2d) 893 (1957).

Where plaintiff brings suit on two causes of action, each must be separately stated. Bannister & Sons v. Williams, 261 N.C. 586, 135 S.E.2d 572 (1964).

Insistence upon separate statement of each cause of action is required in order to give practical effect to the defendant's right to demur to one cause of action and answer another. Heath v. Kirkman, 240 N. C. 303, 82 S. E. (2d) 104 (1954).

Unless the contrary plainly appears, it will be assumed that a complaint that does not set forth separate statements of more than one cause of action is intended to allege a single cause of action and that intimations of other causes of action are mere embellishments and not germane to the cause of action constituting the heart of the complaint. Heath v. Kirkman, 240 N. C. 303, 82 S. E. (2d) 104 (1954).

Subsection 5 of § 1-127, permitting demurrer when several causes of action have been improperly united, is applicable when a complaint alleges facts sufficient to constitute two or more causes of action, but fails to state separately facts sufficient to constitute each cause of action. Perfecting Serv. Co. v. Product Dev. & Sales Co., 261 N.C. 660, 136 S.E.2d 56 (1964).

When Joinder Not Permitted.—Separate and distinct causes of action set up by different plaintiffs or against different defendants may not be incorporated in the same pleading, and such a misjoinder would require dismissal of the action. State v. Johnson, 233 N. C. 588, 64 S. E. (2d) 829 (1951).

Under this section a plaintiff will not be permitted to unite in the same complaint separate and distinct causes of action against five different persons among whom there is no joint or common liability and no privity or community of interest. State v. Johnson, 233 N. C. 588, 64 S. E. (2d) 829 (1951).

There is a material difference between the consolidation of cases for convenience of trial and the joinder in a complaint of several causes of action by virtue of this section. McKinley v. Hinnant, 242 N. C. 245, 87 S. E. (2d) 568 (1955).

A misjoinder of parties and causes requires dismissal of the action. Short v. Nance-Trotter Realty, Inc., 262 N.C. 576, 138 S.E.2d 210 (1964), citing Southern Mills v. Summit Yarn Co., 223 N.C. 479, 27 S.E.2d 289 (1943).

Complaint held demurrable under this section. Belch v. Perry, 240 N. C. 764, 84 S. E. (2d) 186 (1954); Monroe v. Dietenhoffer, 264 N.C. 538, 142 S.E.2d 135 (1965).

Applied in Kearns v. Primm, 263 N.C. 423, 139 S.E.2d 697 (1965); Underwood v. Otwell, 269 N.C. 571, 153 S.E.2d 40 (1967).

Cited in Sellers v. Motors Ins. Corp., 233 N. C. 590, 65 S. E. (2d) 21 (1951); General Tire & Rubber Co. v. Distributors, Inc., 251 N. C. 406, 111 S. E. (2d) 614 (1959); Roberts v. Coca-Cola Bottling Co. v. Asheville, 256 N. C. 434, 124 S. E. (2d) 105 (1962).

II. CAUSES OF ACTION WITH REFERENCE TO TRANSACTION, OR SUBJECT OF ACTION.

The general rule etc.—
In accord with original. See Dixon v. Dixon, 248 N. C. 239, 102 S. E. (2d) 865 (1958).

If the grounds of the bill be not entirely distinct and wholly unconnected; if they arise out of one and the same transaction, or series of transactions, forming one course of dealing, and all tending to one end—if one connected story can be told of the whole, the objection of misjoinder of parties and causes cannot apply. McDaniel v. Fordham, 261 N.C. 423, 135 S.E.2d 22 (1964), citing Virginia-Carolina Chem. Co. v. Floyd, 158 N.C. 455, 74 S.E. 465 (1912).

The Word "Transaction," etc.—
In accord with 2nd paragraph in original. See Mills v. Carolina Cemetery Park Corp., 242 N. C. 20, 86 S. E. (2d) 893 (1955).

The "Subject of Action" Means, etc.—
In accord with original. See Mills v.

Carolina Cemetery Park Corp., 242 N. C. 20, 86 S. E. (2d) 893 (1955).

General Right Arising Out of Series of Transactions.—

Where a general right is claimed arising out of a series of transactions tending to one end, the plaintiff may join several causes of action against defendants who have distinct and separate interests, in order to effect a conclusion of the whole matter in one suit. And it has been held that in such case the share of each, in causing the total loss, may be separately measured and assessed in one action. Erickson v. Starling, 233 N. C. 539, 64 S. E. (2d) 832 (1951).

Where a general right is claimed arising out of a series of transactions tending to one end, the plaintiff may join several causes of action against defendants who have distinct and separate interests, in order to have a conclusion of the whole matter in one suit. McDaniel v. Fordham, 261 N.C. 423, 135 S.E.2d 22 (1964), citing Young v. Young, 81 N.C. 91 (1879).

Causes May Be Joined Although Rights of Defendants Are Distinct.—The objection of misjoinder of parties and causes has been held not to apply when there has been a general right in the plaintiff, covering the whole case, although the rights of the defendants may have been distinct. McDaniel v. Fordham, 261 N.C. 423, 135 S.E.2d 22 (1964).

The objection of misjoinder of parties and causes will not apply when one general right is claimed by the plaintiff, though the individuals made defendants have separate and distinct rights; and in such a case they may all be charged in the same bill, and a demurrer for that cause will not be sustained. McDaniel v. Fordham, 261 N.C. 423, 135 S.E.2d 22 (1964), citing Virginia-Carolina Chem. Co. v. Floyd, 158 N.C. 455, 74 S.E. 465 (1912).

Joinder of Trustees and Others Who Participated in Their Derelictions. — A complaint which seeks to bring in the trustees and their confederates, corporate and individual, with a view to an accounting from all who have participated in the derelictions and maladministration of the trustees or profited therefrom, does not result in misjoinder of parties and causes of action in excess of the permissible provisions of this section. Erickson v. Starling, 233 N. C. 539, 64 S. E. (2d) 832 (1951).

Causes of Action Not Properly Joined.—A cause of action against a cemetery for breach of promissory representations made in the sale of burial lots, and a cause of action against the cemetery to restrain the enforcement of unlawful and unreasonable rules and regulations in the management of the property, are improperly joined in the same complaint. Mills v. Carolina Cemetery Park Corp., 242 N. C 20, 86 S. E. (2d) 893 (1955).

Joint Action for Trespass to Realty and for Injunction against Future Trespass.—Plaintiffs, husband and wife, alleged that defendant mining corporation was discharging vast clouds of dust, containing silicon dioxide, onto plaintiffs' property, exposing them to the danger of silicosis, and resulting in damage to the property, additional work to keep the house clean, and mental anguish on account of the threat to the health of themselves and children. Plaintiffs prayed damages in a stipulated amount and injunction to prevent future trespass. It was held that only one cause of action for damages for trespass and to restrain further trespasses was stated. Therefore demurrer for misjoinder of causes was properly overruled. Hall v. DeWeld Mica Corp., 244 N. C. 182, 93 S. E. (2d) 56 (1956).

Joinder of Actions for Failure to Declare Dividends and for Liquidation and Dissolution of Corporation.—A stockholder in a corporation may sue the corporation, and join its directors as defendants, for failure to declare adequate dividends from the corporation's earnings, and may join therewith a second cause of action for liquidation and involuntary dissolution of the corporation based upon bad faith management in suppressing dividends and in deflating the value of the corporation's assets, thus precluding the plaintiff stockholder from obtaining either a fair dividend or a fair market for his stock. Dowd v. Charlotte Pipe & Foundry Co., 263 N.C. 101, 139 S.E.2d 10 (1964).

III. CAUSES OF ACTION IN CONTRACT.

Action for Breach of Agreement to Lend Money and Forfeiture of Interest for Usury.—Causes of action for breach of agreement to lend stipulated sums of money, based upon allegations that sums less than those agreed upon were made available to plaintiffs, with allegations seeking special damages resulting from such breach, and a cause of action for forfeiture of interest for alleged usury, are all ex contractu relating to one agreement and may be properly joined under the provisions of this section. Perry v. Doub, 238 N. C. 233, 77 S. E. (2d) 711 (1953).

Action on Trade Acceptances and Guaranties Securing Same. — There was

no misjoinder of parties and causes of action where the plaintiff in the same proceeding sued husbands on trade acceptances, and sued their wives on guaranties executed to secure such trade acceptances. Arcady Farms Milling Co. v. Wallace, 242 N. C. 686, 89 S. E. (2d) 413 (1955).

IV. CAUSES OF ACTION FOR TORT TO PERSON OR PROPERTY.

Torts Must Arise Immediately and Directly Out of Subject of Primary Action.—The personal injuries and property damage suffered by a party, and not the accident causing them, is the subject of his action in tort, and his right to compensation therefor is the claim he asserts, and only such torts as arise immediately and directly out of the subject of the original or primary action and which have such relation thereto that their adjustment is necessary to a full and final determination of that cause may be joined in the complaint or pleaded as a cross action. Wrenn v. Graham, 236 N. C. 719, 74 S. E. (2d) 232 (1953).

Defendant May Not File Cross Action against Codefendants to Recover for His Own Injuries and Damage.—In an action founded on allegations of negligence, one of the defendants cannot file and prosecute a cross action against his codefendants to recover compensation for personal injuries and property damage which he alleges arose out of and were proximately caused by the same automobile collision out of which plaintiff's cause of action arose. Wrenn v. Graham, 236 N. C. 719, 74 S. E. (2d) 232 (1953); Jarrett v. Brogdon, 256 N. C. 693, 124 S. E. (2d) 850 (1962). See Morgan v. Brooks, 241 N. C. 527, 85 S. E. (2d) 869 (1955).

V. MUST AFFECT ALL PARTIES AND HAVE SAME VENUE.

General Rule.—

Ordinarily only those matters germane to the cause of action asserted in the complaint and in which all the parties have a community of interest may be litigated in the same action. Wrenn v. Graham, 236 N. C. 719, 74 S. E. (2d) 232 (1953).

Causes Affecting Different Parties.—

In accord with 1st paragraph in original. See Tart v. Byrne, 243 N. C. 409, 90 S. E. (2d) 692 (1956); Orkin Exterminating Co. v. O'Hanlon, 243 N. C. 457, 91 S. E. (2d) 222 (1956).

There is a misjoinder of causes of action where there are three defendants and at least three causes of action are set out, which do not affect all the parties to the action as required by this section. McKinley v. Hinnant, 242 N. C. 245, 87 S. E. (2d) 568 (1955).

This section authorizes the joinder of certain causes of action, but each of them must affect all the parties to the transaction, and it is not sufficient that some of the defendants be affected by each of them. National Ass'n for Advancement of Colored People v. Eure, 245 N. C. 331, 95 S. E. (2d) 893 (1957).

Where an action was brought under the Declaratory Judgment Act against the Secretary of State and the Attorney General to obtain a declaration as to the applicability to plaintiff of G. S. 55-118 and 120-48 et seq., the court properly sustained a demurrer for misjoinder of parties and causes of action, since the Attorney General is not affected by the cause of action relating to the registration of persons and organizations engaged in influencing public opinion or legislation, and therefore the causes do not affect all the parties. National Ass'n for Advancement of Colored People v. Eure, 245 N. C. 331, 95 S. E. (2d) 893 (1957).

In a civil action in which plaintiffs sought, inter alia, to determine the location of a boundary line between adjoining landowners and joined additional causes of action seeking to recover damages for an alleged trespass by each defendant, the causes of action, united in the same complaint, did not affect all the parties to the action as required by this section, and the court properly dismissed the action for misjoinder of parties and causes of action. Johnson v. Daughety, 270 N.C. 762, 155 S.E.2d 205 (1967).

Article 13.

Defendant's Pleadings.

§ 1-124. Demurrer and answer.

An answer is a pleading designed to present the defendant's side of the case stated in the plaintiff's complaint. Wells v. Clayton, 236 N. C. 102, 72 S. E. (2d) 16 (1952).

If there are several causes of action alleged, the defendant may demur to each one separately, or he may demur to some and answer to the others, and if the demurrer should be sustained to any one

cause it would not affect the others; but if a demurrer is interposed to the whole complaint and any one of the causes of action is good, the demurrer will be overruled. Heath v. Kirkman, 240 N. C. 303, 82 S. E. (2d) 104 (1954).

Quoted in Orkin Exterminating Co. v. C'Hanlon, 243 N. C. 457, 91 S. E. (2d) 222 (1956).

Stated in Spain v. Brown, 236 N. C. 355, 72 S. E. (2d) 918 (1952).

Cited in Williams v. Denning, 260 N.C. 539, 133 S.E.2d 150 (1963).

§ 1-125. When defendant appears and pleads; petition to remove to federal court; extension of time; clerk to mail answer to plaintiff. —The defendant must appear and demur or answer within thirty (30) days after the service of summons upon him, or within thirty (30) days after the final determination of a motion to remove as a matter of right, or after the final determination of a motion to dismiss upon a special appearance, or after the final determination of any other motion required to be made prior to the filing of the answer, or after final judgment overruling demurrer, or after the final determination of a motion to set aside a judgment by default under G. S. 1-220, or to set aside a judgment under G. S. 1-108, provided, that when service of process is had by publication the person served shall make defense within the time specified in the published notice, which stated time shall be not less than twenty (20) days nor more than thirty (30) days in the case of civil actions, and not less than ten (10) days nor more than twenty (20) days in the case of special proceedings, after the summons is deemed served, as provided in G. S. 1-100. Upon the filing in a district court of the United States of a petition for the removal of a civil action or proceeding from a court in this State and the filing of a copy of the petition in the State court, the State court shall proceed no further therein unless and until the case is remanded; and in the event it shall be finally determined in the United States courts that the case was not removable or was improperly removed, or for other reason should be remanded, and a final order is entered remanding the case to the State court, the defendant or defendants, or any other party who would have been permitted or required to file a pleading had the removal proceedings not been instituted, will have thirty (30) days after the filing in such State court of a certified copy of the order of remand to file motions or demur, answer or otherwise plead. If the time is extended for filing the complaint, and a copy of the complaint, when filed, is served on the defendant, then, in such case, the defendant shall have thirty days after the date when the copy of the complaint was served on him, pursuant to G. S. 1-121, or the defendant shall have thirty days after the final date fixed for filing the complaint, whichever is the later date, in which to plead. If the time is extended for filing complaint and a copy of the complaint, when filed, is not served on the defendant, then, in such case, said defendant shall have thirty days after the date of the sheriff's return showing that service was not made of such complaint, pursuant to G. S. 1-121, or the defendant shall have thirty days after the final day fixed for filing the complaint, whichever is the later date, in which to plead. The clerk shall not extend the time for filing answer or demurrer more than once nor for a period of time exceeding twenty days except by consent of parties. The defendant shall, when he files answer, likewise file at least one copy thereof for the use of the plaintiff, and his attorney; and the clerk shall not receive and file any answer until and unless such copy is filed therewith. The clerk shall forthwith mail the copy of answer filed to the plaintiff or his attorney of record. This section shall also apply to all courts of record interior to the superior court, where any defendant resides out of the county from which the summons is issued and no court of record interior to the superior court shall fix such return date at less than thirty (30) days. (1870-1, c. 42, s. 4; Code s. 207; Rev., s. 473; 1919, c. 304, s. 3; C. S., s. 509; Ex. Sess. 1921, c. 92, s. 1, par. 3; 1927, c. 66, s. 4; 1935, c. 267; 1949, c. 808, s. 1; 1949, c. 1113, s. 2; 1953, c. 919, s. 4.)

Editor's Note.—

The 1953 amendment, effective July 1, 1953, added the proviso to the first sentence.

A motion to strike, etc.—

A motion to strike is within the category of "other motions" after final determination of which thirty days' extension is allowed by this section. However, a motion to strike is required by § 1-153 to be made before answer or demurrer, or before an extension of time to plead is granted. Potts v. Howser, 267 N.C. 484, 148 S.E.2d 836 (1966).

A defendant has thirty days after order overruling his demurrer in which to file answer or petition the Supreme Court for certiorari. Wheeler v. Thabit, 261 N.C. 479, 135 S.E.2d 10 (1964).

Presumption That Copy, etc.—

In accord with original. See State Highway Comm'n v. Hemphill, 269 N.C. 535, 153 S.E.2d 22 (1967).

There is no statutory requirement that a motion for extension of time be made before answer. Potts v. Howser, 267 N.C. 484, 148 S.E.2d 836 (1966).

Hence, such motion is not "any other motion required to be made prior to the filing of the answer" within the intent and language of this section. Potts v. Howser, 267 N.C. 484, 148 S.E.2d 836 (1966).

If a motion for extension of time were to be construed to be "any other motion required to be made prior to the filing of the answer," this section would contradict itself by allowing thirty days' extension after the clerk's determination to disallow a petition for twenty days in which to demur or plead. Potts v. Howser, 267 N.C. 484, 148 S.E.2d 836 (1966).

Nor Is a Petition Seeking Limitation of Liability.—In an action for damages arising out of a boat collision on a lake defendant's filing of a petition in admiralty seeking a limitation of liability (46 U.S.C. § 183 et seq.) is not a motion within the purview of this section, and does not preclude the clerk from entering a judgment by default and inquiry under § 1-212 for failure or defendant to answer or demur within the time limited. Potts v. Howser, 267 N.C. 484, 148 S.E.2d 836 (1966).

Second Order Extending Time Inoperative without Plaintiff's Consent.—A second order extending the time in which to file answer or to otherwise plead, not granted with the consent of the plaintiff or his attorney, is inoperative. Wheeler v. Thabit, 261 N.C. 479, 135 S.E.2d 10 (1964).

Failure to Give Opportunity to Answer.—An order in custody proceeding was vacated by the Supreme Court where the trial court having overruled defendant's demurrer and motion to dismiss proceeded to hear the evidence and render final judgment on the merits without giving the defendant an opportunity to answer. Dellinger v. Bollinger, 242 N. C. 696, 89 S. E. (2d) 592 (1955).

When Plaintiff Entitled to Judgment by Default.—The plaintiff is not entitled to judgment by default for want of an answer until the time prescribed by this section within which to answer has elapsed. Braswell v. Atlantic Coast Line R. Co., 233 N. C. 640, 65 S. E. (2d) 226 (1951).

Upon denying a motion for extension of time in which to demur or plead, the clerk is authorized to enter judgment by default for failure of defendant to demur or answer within the time limited. Potts v. Howser, 267 N.C. 484, 148 S.E.2d 836 (1966).

Motion for Change of Venue.—In the light of the provisions of this section, it would seem that in a case where defendant claims right of removal as a matter of right the first move of defendant is motion for change of venue—and that upon failure to so move the right is waived. Nelms v. Nelms, 250 N. C. 237, 108 S. E. (2d) 529 (1959).

Applied in Dickson v. Fogarty Bros. Transfer, Inc., 238 N. C. 570, 78 S. E. (2d) 446 (1953); Cranford v. Steed, 268 N.C. 595, 151 S.E.2d 206 (1966).

Cited in Page v. Miller, 252 N. C. 23, 113 S. E. (2d) 52 (1960); Perfecting Serv. Co. v. Product Dev. & Sales Co., 264 N.C. 79, 140 S.E.2d 763 (1965).

§ 1-126. Sham and irrelevant defenses.

When Section Applicable to Pleas of Res Judicata and Estoppel by Judgment.—When the facts constituting the pleas in bar of res judicata and estoppel by judgment are shown on the face of defendant's pleadings, the sufficiency of such pleas may be tested by a motion to strike under this section or by demurrer under § 1-141. Troy Lumber Co. v. Hunt, 251 N. C. 624, 112 S. E. (2d) 132 (1960).

Striking Defense as Sham on Basis of Plaintiff's Conclusory Affidavit. — Where the presiding judge, solely on the basis of a mere conclusory affidavit submitted by the plaintiff, struck certain allegations from the answer on the ground that they con-

stituted a sham defense within the purview of this section, it was held error, since the record did not indicate in any way that the defense was a mere pretense set up by the defendant in bad faith and without color of fact. Penn Dixie Lines, Inc. v. Grannick, 238 N. C. 552, 78 S. E. (2d) 410 (1953).

Cited in Williams v. Union County Hospital Ass'n, 234 N. C. 536, 67 S. E. (2d) 662 (1951).

ARTICLE 14.

Demurrer.

§ 1-127. Grounds for.

I. IN GENERAL.

The office of the demurrer is to test the sufficiency of a pleading, admitting for the purpose the truth of factual averments well stated and such relevant inferences of fact as may be deduced therefrom. Lynn v. Clark, 254 N. C. 460, 119 S. E. (2d) 187 (1961).

A demurrer presents squarely for decision the sufficiency of the complaint because the demurrer, for the purpose, admits the truth of factual averments well stated, and such relevant inferences as may be deduced therefrom, but not legal inferences or conclusions of law asserted by the pleader. Greer v. Skyway Broadcasting Co., 256 N. C. 382, 124 S. E. (2d) 98 (1962).

The admissions inherent in a demurrer are not absolute, because the conditional admissions made by a demurrer forthwith end if the demurrer is overruled. General Ins. Co. of America v. Faulkner, 259 N. C. 317, 130 S. E. (2d) 645 (1963).

Demurrer Does Not Admit Conclusions of Law.—

In accord with original. See McDonald v. Carper, 252 N. C. 29, 112 S. E. (2d) 741 (1960); General Ins. Co. of America v. Faulkner, 259 N. C. 317, 130 S. E. (2d) 645 (1963); Coble v. Reap, 269 N.C. 229, 152 S.E.2d 219 (1967).

The facts alleged, but not the pleader's legal conclusions, are deemed admitted when the sufficiency of the complaint is tested by demurrer. Gillispie v. Goodyear Service Stores, 258 N. C. 487, 128 S. E. (2d) 762 (1963); Copple v. Warner, 260 N.C. 727, 133 S.E.2d 641 (1963); Bennett v. National Sur. Corp., 261 N.C. 345, 134 S.E.2d 678 (1964).

A demurrer admits as true the allegations of the facts contained in the complaint, but does not admit inferences or conclusions of law. Brevard v. State Farm Mut. Auto. Ins. Co., 262 N.C. 458, 137 S.E.2d 837 (1964).

Where the complaint merely alleges conclusions and not facts, it fails to state a cause of action and is demurrable. Gillispie v. Goodyear Service Stores, 258 N. C. 487, 128 S. E. (2d) 762 (1963).

Pleadings challenged by a demurrer are to be construed liberally, with a view to substantial justice between the parties. Jacobs v. State Highway Comm., 254 N. C. 200, 118 S. E. (2d) 416 (1961); Lynn v. Clark, 254 N. C. 460, 119 S. E. (2d) 187 (1961).

Defect Must Appear on Face of Pleading Attacked. — A demurrer lies only when the defect asserted as the ground of demurrer is apparent upon the face of the pleading attacked. A demurrer which requires reference to facts not appearing on the face of the pleading attacked is a "speaking demurrer," and is bad. J. A. Jones Constr. Co. v. Local Union 755, etc., 246 N. C. 481, 98 S. E. (2d) 852 (1957).

In an action to enjoin alleged unlawful picketing pursuant to a conspiracy to force plaintiff to violate the State Right to Work Statute, G. S. 95-78 through 95-84, demurrer on the ground that the action was within the exclusive jurisdiction of the National Labor Relations Board and the federal courts, is properly overruled when it is not alleged in the complaint, expressly or inferentially, that plaintiff was or is engaged in a business affecting interstate or foreign commerce, and the allegation of additional facts in the demurrer relative to this point is bad as a speaking demurrer. J. A. Jones Constr. Co. v. Local Union 755, etc., 246 N. C. 481, 98 S. E. (2d) 852 (1957).

A demurrer lies only when the defect asserted as the ground of demurrer is apparent upon the face of the pleading attacked. Rhyne v. Clark, 255 N. C. 418, 121 S. E. (2d) 606 (1961).

On demurrer only facts properly pleaded are to be considered, with legal inferences and conclusions of the pleader to be disregarded. Johnson v. Johnson, 259 N. C. 430, 130 S. E. (2d) 876 (1963).

Facts alleged in defendants' answer may not be considered in passing on the legal sufficiency of the complaint. Rhyne v.

Clark, 255 N. C. 418, 121 S. E. (2d) 606 (1961).

Demurrer to Complaint and Demurrer to Evidence Distinguished.—A demurrer to a complaint, under this section, and a demurrer to the evidence, under § 1-183, are different in purpose and result. One challenges the sufficiency of the pleadings, the other the sufficiency of the evidence. Gantt v. Hobson, 240 N. C. 426, 82 S. E. (2d) 384 (1954); Riddle v. Artis, 246 N. C. 629, 99 S. E. (2d) 857 (1957).

A plea of the statute of limitations is not one of the grounds for demurrer specified in this section and cannot be taken advantage of in this manner. Stamey v. Rutherfordton Electric Membership Corp., 249 N. C. 90, 105 S. E. (2d) 282 (1958); Harrell v. Powell, 251 N. C. 636, 112 S. E. (2d) 81 (1960).

Nor Is Fact Relief Sought Is Not Warranted by Allegations.—The fact that a plaintiff seeks relief not warranted by his allegations is not within the enumeration in this section. Fremont City Board of Education v. Wayne County Board of Education, 259 N. C. 280, 130 S. E. (2d) 408 (1963).

A motion to strike a pleading in its entirety and dismiss the action was in substance, if not in form, a demurrer to the pleading, and was so considered. Johnson v. Johnson, 259 N. C. 430, 130 S. E. (2d) 876 (1963).

Motion of Additional Defendant to Strike Cross Action for Contribution Treated as Demurrer.—See note to § 1-240.

An order overruling demurrer does not preclude motion for judgment as in case of nonsuit upon the trial, since the demurrer tests the sufficiency of the pleadings, while the motion to nonsuit tests the sufficiency of the evidence. Lewis v. Shaver, 236 N. C. 510, 73 S. E. (2d) 320 (1952).

Appeal from Order Overruling Demurrer.—See Supreme Court Rules, Appx. I, (1), Rule 4(a).

Applied in Flynt v. Flynt, 237 N. C. 754, 75 S. E. (2d) 901 (1953); Shives v. Sample, 238 N. C. 724, 79 S. E. (2d) 193 (1953); Heath v. Kirkman, 240 N. C. 303, 82 S. E. (2d) 104 (1954); Midkiff v. Auto Racing, Inc., 240 N. C. 470, 82 S. E. (2d) 417 (1954).

Stated in National Ass'n for Advancement of Colored People v. Eure, 245 N. C. 331, 95 S. E. (2d) 893 (1957); Lowry v. Dillingham, 246 N. C. 618, 99 S. E. (2d) 771 (1957).

Cited in Anderson v. Atkinson, 235 N. C. 300, 69 S. E. (2d) 603 (1952); McKinley v. Hinnant, 242 N. C. 245, 87 S. E. (2d) 568 (1955); Hall v. DeWeld Mica Corp., 244 N. C. 182, 93 S. E. (2d) 56 (1956); Broadway v. Asheboro, 250 N. C. 232, 108 S. E. (2d) 441 (1959); Rudisill v. Hoyle, 254 N. C. 33, 118 S. E. (2d) 145 (1961); Thomas v. Thomas, 259 N. C. 461, 130 S. E. (2d) 871 (1963); Jocie Motor Lines, Inc. v. International Bhd. of Teamsters, 260 N.C. 315, 132 S.E.2d 697 (1963).

II. LACK OF JURISDICTION.

May Be Made at Any Time.—

In accord with original. See Coble v. Reap, 269 N.C. 229, 152 S.E.2d 219 (1967).

Defect Must Appear on Face of Complaint.—A demurrer to a complaint on the ground that the court has no jurisdiction of the person of the defendant, or of the subject of the action, will be sustained when, and only when, such defect appears upon the face of the complaint. Richardson v. Richardson, 261 N.C. 521, 135 S.E.2d 532 (1964); Coble v. Reap, 269 N.C. 229, 152 S.E.2d 219 (1967).

Overruling Demurrer Held Error.—See Anderson v. Atkinson, 234 N. C. 271, 66 S. E. (2d) 886 (1951).

IV. PENDENCY OF ANOTHER ACTION.

Availed of by Demurrer or Answer.—

In accord with 2nd paragraph in original. See Buchanan v. Smawley, 246 N. C. 592, 99 S. E. (2d) 787 (1957).

The pendency of a prior action between the same parties for the same cause of action may be taken advantage of by demurrer when the fact of such pendency appears on the face of the complaint; but under § 1-133 it must be raised by answer when the fact of the pendency of the prior action does not appear on the face of the complaint. McDowell v. Blythe Bros. Co. 236 N. C. 396, 72 S. E. (2d) 860 (1952); Wallace v. Johnson, 251 N. C. 11, 110 S. E. (2d) 488 (1959); Demoret v. Lowery, 252 N. C. 187, 113 S. E. (2d) 199 (1960).

Where the complaint contains no reference to a prior action pending in another court, assuming the prior action "is another action pending between the same parties for the same cause" within the meaning of this section, defendant is required by § 1-133 to assert his plea in abatement by answer. Perry v. Owens, 257 N. C. 98, 125 S. E. (2d) 287 (1962).

When Prior Action Works Abatement.—The pendency of a prior action between the same parties for the same cause in a state

court of competent jurisdiction works an abatement of a subsequent action either in the same court or in another court of the state having like jurisdiction. Perry v. Owens, 257 N. C. 98, 125 S. E. (2d) 287 (1962); W. S. Boyd Sales Co., Inc. v. Seymour, 255 N. C. 714, 122 S. E. (2d) 605 (1961).

A plea in abatement by defendant on the ground that another action is pending between the same parties for the same cause is good only if (1) the plaintiff in the second action could obtain the same relief by counterclaim in the prior action, and (2) a judgment in favor of the plaintiff in the prior action (defendant in the second action) would operate as a bar to plaintiff's prosecution of the second action. Perry v. Owens, 257 N. C. 98, 125 S. E. (2d) 287 (1962).

Prior Action in Court of Limited Jurisdiction.—Where a party institutes action in a county court limited as to jurisdictional amount, he may not assert the pendency of such action as ground for abatement of a subsequent action instituted in the superior court of another county, demanding a sum in excess of the jurisdictional amount of the county court, since a plea in abatement must be based on the pendency of an action in a court of competent jurisdiction. Perry v. Owens, 257 N. C. 98, 125 S. E. (2d) 287 (1962).

The ordinary test for determining whether the parties and causes are the same for the purpose of abatement by reason of the pendency of the prior action is this: Do the two actions present a substantial identity as to parties, subject matter, issues involved, and relief demanded? Wirth v. Bracey, 258 N. C. 505, 128 S. E. (2d) 810 (1963); Diamond Brand Canvas Prods. Co. v. Christy, 262 N.C. 579, 138 S.E.2d 218 (1964).

"Another action" would seem to refer to an action of like nature, that is, a civil action instituted under and subject to the provisions of the Code of Civil Procedure. Wirth v. Bracey, 258 N. C. 505, 128 S. E. (2d) 810 (1963).

A claim filed by plaintiffs with the Industrial Commission against the North Carolina Highway Commission to recover for injuries and damages sustained in a collision and filed prior to an action for negligence against a member of the Highway Patrol did not constitute another action pending between the same parties within the meaning of subdivision (3) of this section. Wirth v. Bracey, 258 N. C. 505, 128 S. E. (2d) 810 (1963).

Actions Not for Same Cause of Action.—Prior action by corporation against officer to recover alleged unlawful withdrawals by officer was not for the same cause of action as action by officer to recover amount of unpaid salary from the corporation within the meaning of subsection (3) of this section. Hill v. Hill Spinning Co., 244 N. C. 554, 94 S. E. (2d) 677 (1956).

V. DEFECT OF PARTIES.

When Defect of Parties Occurs.—A defect of parties occurs when there has been a failure to join either a plaintiff or a defendant whose presence in the suit is necessary to give the court jurisdiction and authority to decide the controversy. Miller v. Jones, 268 N.C. 568, 151 S.E.2d 23 (1966).

How Taken Advantage of.—

When a defect of parties appears from the complaint itself, it is a ground for demurrer. Miller v. Jones, 268 N.C. 568, 151 S.E.2d 23 (1966).

How Defect of Party Cured.—

A defect of parties is fatal unless the necessary party is brought in under § 1-73. Miller v. Jones, 268 N.C. 568, 151 S.E.2d 23 (1966).

Administrator Must Sue to Recover Debt or Personal Property.—Since pending the administration of an esta e title to personal property of an intestate vests in his administrator and not his next of kin, it necessarily follows that the administrator, and not creditors or next of kin, is the proper party to bring an action to collect a debt due the estate or to recover specific personal property. Spivey v. Godfrey, 258 N. C. 676, 129 S. E. (2d) 253 (1963).

Same—Exceptions to Rule.—To the general rule that the administrator must bring suit there are certain exceptions. If the administrator has refused to bring the action to collect the assets; if there is collusion between a debtor and a personal representative, particularly if the latter is insolvent; or, if some other peculiar circumstance warrants it, the creditors or next of kin may bring the action which the personal representative should have brought. However, in such a case the administrator must be a party defendant. Spivey v. Godfrey, 258 N. C. 676, 129 S. E. (2d) 253 (1963).

Misjoinder of an Unnecessary Party.—

Demurrer will not lie for misjoinder of parties alone, even in those instances when such defect appears on the face of the complaint itself, since such misjoinder is not fatal and may be cured by the withdrawal of a plaintiff or the dismissal of a

defendant, as the case may be. Miller v. Jones, 268 N.C. 568, 151 S.E.2d 23 (1966).

Misjoinder of Parties and Causes.—In accord with 2nd paragraph in original. See Tart v. Byrne, 243 N. C. 409, 90 S. E. (2d) 692 (1956).

Where there is a misjoinder of parties and causes of action, the action should be dismissed. Kearns v. Primm, 263 N.C. 423, 139 S.E.2d 697 (1965).

Nonjoinder.—A complaint for an accounting by heirs of deceased partner against surviving partner held demurrable for defect of parties due to failure to join personal representative. Ewing v. Caldwell, 243 N. C. 18, 89 S. E. (2d) 774 (1955).

Cited in Conger v. Travelers Ins. Co., 260 N. C. 112, 131 S. E. (2d) 889 (1963).

VI. MISJOINDER OF SEVERAL CAUSES OF ACTION.

Causes Not Separately Stated.—Subsection 5 is applicable when a complaint alleges facts sufficient to constitute two or more causes of action but fails to state separately facts sufficient to constitute each cause of action. Too, each separately stated cause of action must be complete within itself; it is not permissible to incorporate by reference allegations set forth in another separately stated cause of action. Heath v. Kirkman, 240 N. C. 303, 82 S. E. (2d) 104 (1954).

Subsection 5 of this section has been considered frequently when demurrer has been interposed on the ground that two or more separately stated causes of action have been improperly united in the same complaint, and it is equally applicable when a complaint alleges facts sufficient to constitute two or more causes of action, but fails to state separately facts sufficient to constitute each cause of action. Perfecting Serv. Co. v. Product Dev. & Sales Co., 261 N.C. 660, 136 S.E.2d 56 (1964).

Failure to Distinguish between Allegations Relating to Cross Action and Those Relating to Counterclaim.—Where one defendant attempts to allege a cross action against his codefendant and also a counterclaim against the plaintiff, but does not distinguish between the allegations relating to the cross action and the allegations relating to the counterclaim, demurrer to the counterclaim must be sustained, even though the counterclaim, if properly alleged, is maintainable. Perfecting Serv. Co. v. Product Dev. & Sales Co., 261 N.C. 660, 136 S.E.2d 56 (1964).

Sustaining Demurrer without Prejudice to Right to Move to Amend Complaint.—Sustaining the demurrer under subsection 5 of this section would be without prejudice to plaintiff's right under § 1-131 to move for leave to amend his complaint so as to state separately his alleged causes of action. Monroe v. Dietenhoffer, 264 N.C. 538, 142 S.E.2d 135 (1965).

Cited in Conger v. Travelers Ins. Co., 260 N. C. 112, 131 S. E. (2d) 889 (1963).

VII. FAILURE TO STATE SUFFICIENT FACTS.

Complaint Must Be Fatally Defective before It Will Be Rejected. — Where a general demurrer is filed to a complaint as a whole, if any portion of the pleadings is good and states a cause of action, the demurrer should be overruled. A complaint must be fatally defective before it will be rejected as insufficient. Buchanan v. Smawley, 246 N. C. 592, 99 S. E. (2d) 787 (1957).

A complaint for an accounting by heirs of deceased partner against surviving partner held demurrable for failure to allege facts sufficient to state a cause of action. Ewing v. Caldwell, 243 N. C. 18, 89 S. E. (2d) 774 (1955).

Complaint Liberally Construed.—Section 1-151 required that a complaint demurred to for failure to state facts sufficient to constitute a cause of action be construed liberally with a view to substantial justice between the parties. Johnson v. Johnson, 259 N. C. 430, 130 S. E. (2d) 876 (1963).

Truth of Material Facts Admitted.—A demurrer to a complaint for failure to state facts sufficient to constitute a cause of action admits the truth of every material fact properly alleged. Johnson v. Johnson, 259 N. C. 430, 130 S. E. (2d) 876 (1963).

Applied in Guilford Realty & Ins. Co. v. Blythe Bros. Co., 260 N. C. 69, 131 S. E. (2d) 900 (1963).

§ 1-128. Must specify grounds.

This section applies to all demurrers, written or oral. Adams v. Flora Macdonald College, 247 N. C. 648, 101 S. E. (2d) 809 (1958); Guilford Realty & Ins. Co. v. Blythe Bros. Co., 260 N. C. 69, 131 S. E. (2d) 900 (1963).

Must Specify for Purpose of Amendment.—In accord with 2nd paragraph in original. See McKinley v. Hinnant, 242 N. C.

245, 87 S. E. (2d) 568 (1955); Short v. Central Bus Sales Corp., 259 N. C. 133, 129 S. E. (2d) 887 (1963).

A demurrer "that the complaint states no cause of action whatever," etc.—

A demurrer which merely charges that the petition does not state a cause of action is broadside and will be disregarded. Pratt v. Bishop, 257 N. C. 486, 126 S. E. (2d) 597 (1962).

Insufficient Demurrers.—

In accord with 1st paragraph in original. See Commercial Credit Corp. v. Robeson Motors, Inc., 243 N. C. 326, 90 S. E. (2d) 886 (1956); Johnson v. Graye, 251 N. C. 448, 111 S. E. (2d) 595 (1959); Williams v. Strickland, 251 N. C. 767, 112 S. E. (2d) 533 (1960).

A written demurrer which states there is a defect of parties defendant appearing on the face of the complaint, but which fails to state what persons should be made defendants and on what grounds, may be disregarded. McKinley v. Hinnant, 242 N. C. 245, 87 S. E. (2d) 568 (1955).

A demurrer ore tenus, which asserted in general terms that the complaint did not allege facts sufficient to constitute a cause of action and which did not distinctly specify the grounds of objection to the complaint, could have been disregarded by the court. Guilford Realty & Ins. Co. v. Blythe Bros. Co., 260 N. C. 69, 131 S. E. (2d) 900 (1963).

Applied in Crouch v. Lowther Trucking Co., 262 N.C. 85, 136 S.E.2d 246 (1964).

§ 1-129. Amendment; hearing.

Time of Amendment as a Matter of Right.—The plaintiff not having amended his complaint within five days after the day on which the demurrer was filed, on which date his attorneys accepted service of a copy of the written demurrer, the defendant had the right to have the demurrer ruled upon after the lapse of five days therefrom; and therefore, the ruling of the court in declining to continue the hearing on the demurrers as requested by the plaintiff, to allow him to amend, was upheld without prejudice to the right of the plaintiff to apply for leave to amend, as provided in § 1-131. Upchurch v. Raleigh, 252 N. C. 676, 114 S. E. (2d) 772 (1960).

Cited in Kleibor v. Rogers, 265 N.C. 304, 144 S.E.2d 27 (1965).

§ 1-130. **Appeals.**—Upon the rendering of the decision upon the demurrer, if either party desires to appeal, notice shall be given and the appeal perfected as is now provided in case of appeals from decisions in term time subject to the rules of the Supreme Court. (1919, c. 304, s. 5; C. S., s. 514; Ex. Sess. 1921, c. 92 s. 6; 1957, c. 142.)

Editor's Note. — The 1957 amendment added the words "subject to the rules of the Supreme Court" at the end of the section.

§ 1-131. **Procedure after return of judgment.**—Within thirty days after the return of the judgment upon the demurrer, if there is no appeal, or within thirty days after the receipt of the certificate from the Supreme Court, if there is an appeal, if the demurrer is sustained the plaintiff may move, upon three days' notice, for leave to amend the complaint. If this is not granted, judgment shall be entered dismissing the action, and if there has been no appeal from the judgment sustaining the demurrer the plaintiff may, one time, commence a new action in the same manner as if the plaintiff had been nonsuited. If the demurrer is overruled the answer shall be filed within thirty days after the receipt of the judgment, if there is no appeal, or within thirty days after the receipt of the certificate of the Supreme Court, if there is an appeal. Otherwise the plaintiff shall be entitled to judgment by default final or by default and inquiry according to the course and practice of the court. (1919, c. 304, ss. 6, 7; C. S., s. 515; Ex. Sess. 1921, c. 92, ss. 7, 8; 1949, c. 972; 1965, c. 747.)

Editor's Note.—

The 1965 amendment added the language in the second sentence beginning with the words "and if."

For an article discussing the language of the 1965 amendment in relation to the statute of limitations and res judicata, see 45 N.C.L. Rev. 659 (1967).

A judgment sustaining demurrer and dismissing the action is a final judgment which terminates the action, and therefore when such judgment was entered prior to

the effective date of the 1965 amendment to this section, permitting one action to be instituted after judgment sustaining demurrer, the action was not then pending, and the amendment, although applying to pending litigation as well as subsequent litigation, could have no application. Davis v. Anderson Indus., Inc., 266 N.C. 610, 146 S.E.2d 817 (1966).

Discretion of Court.—

In accord with 1st paragraph in original. See Burrell v. Dickson Transfer Co., 244 N. C. 662, 94 S. E. (2d) 829 (1956).

The motion to amend was addressed to the discretion of the court and the court's decision thereon was not subject to review, there being no showing or contention that the court abused its discretion. Perfecting Serv. Co. v. Product Dev. & Sales Co., 264 N.C. 79, 140 S.E.2d 763 (1965).

When Action Dismissed.—When a demurrer is sustained the action will be then dismissed only if the allegations of the complaint affirmatively disclose a defective cause of action, that is, that plaintiff has no cause of action against the defendant. Where the complaint discloses facts which might be the basis of a good cause of action against defendants if such cause is sufficiently pleaded, the demurrer should be sustained without prejudice to plaintiffs' right to move for leave to amend their complaint. Elliott v. Goss, 250 N. C. 185, 108 S. E. (2d) 475 (1959); East Carolina Lumber Co. v. Pamlico County, 250 N. C. 681, 110 S. E. (2d) 278 (1959).

The court passes on a demurrer as a matter of law. If the facts alleged in a complaint constitute a defective statement of a good cause of action, judgment is entered sustaining the demurrer but permitting the plaintiff to amend. However, if the complaint shows the plaintiff does not have a cause of action, that is, the cause he attempts to allege is fatally defective, judgment is entered sustaining the demurrer and dismissing the action. Parris v. Brantley, 256 N. C. 541, 124 S. E. (2d) 533 (1962).

Amendment after Demurrer Sustained.—

Where there is a defective statement of a good cause of action, the complaint is subject to amendment, and the action should not be dismissed until the time for obtaining leave to amend has expired. But where there is a statement of a defective cause of action, final judgment dismissing the action should be entered. Mills v. Richardson, 240 N. C. 187, 81 S. E. (2d) 409 (1954); Lindley v. Yeatman, 242 N. C. 145, 87 S. E. (2d) 5 (1955); Burrell v. Dickson Transfer Co., 244 N. C. 662, 94 S. E. (2d) 829 (1956); Adams v. Flora Macdonald College, 247 N. C. 648, 101 S. E. (2d) 809 (1958).

Where plaintiff has a good cause of action and the defect in pleading is the deficiency in plaintiff's factual allegations, a demurrer should have been sustained without prejudice to plaintiff's right to move for leave to amend her complaint under this section. Skipper v. Cheatham, 249 N. C. 706, 107 S. E. (2d) 625 (1959).

If the complaint is defective because of the failure to allege some essential fact, the action should not be dismissed but an opportunity should be given to amend the pleading by alleging the additional essential fact. Walker v. Nicholson, 257 N. C. 744, 127 S. E. (2d) 564 (1962).

Upon sustaining a demurrer to a complaint stating a cause of action in a defective manner in omitting essential averments, the action should not be dismissed until plaintiff is given opportunity to amend. Nodine v. Goodyear Mortgage Corp., 260 N.C. 302, 132 S.E.2d 631 (1963).

Where the complaint contains a defective statement of a good cause of action, defendants' demurrer will be allowed, even in the Supreme Court, but the action will not be dismissed until plaintiff is given opportunity to amend. Gadsden v. Johnson, 261 N.C. 743, 136 S.E.2d 74 (1964).

Sustaining the demurrer under subsection 5 of § 1-127 would be without prejudice to plaintiff's right under this section to move for leave to amend his complaint so as to state separately his alleged causes of action. Monroe v. Dietenhoffer, 264 N.C. 538, 142 S.E.2d 135 (1965).

Upon sustaining a demurrer for failure of the complaint to allege a cause of action, the court should not dismiss the action until the pleader has had opportunity to amend. Mabe v. Green, 270 N.C. 276, 154 S.E.2d 91 (1967).

Where the defendants may be able to make allegations in an amended answer which would meet the objections raised by demurrer to their cross action, they should have been authorized to further plead pursuant to the authority of this section. Rodman v. Mish, 269 N.C. 613, 153 S.E.2d 136 (1967).

Order Dismissing Amended Complaint.—This section authorizes dismissal of the action if leave to amend is not obtained. An order dismissing the amended complaint (filed without leave) does not dismiss the action but merely leaves it still pending without a pleading. The defendant has the right to move that the action be dismissed for failure to comply with the

statutory requirement. Dudley v. Dudley, 250 N. C. 95, 107 S. E. (2d) 918 (1959).

Notice of Motion.—

In accord with 1st paragraph in original. See Burrell v. Dickson Transfer Co., 244 N. C. 662, 94 S. E. (2d) 829 (1956).

Motion to Strike Amended Complaint Properly Disallowed.—Where order overruling demurrer to an amended complaint recites that the amended complaint, which was filed in apt time, was with leave of the court, and the recital in the order is not challenged, defendant may not thereafter contend that his motion to strike the amended complaint should have been allowed because no motion for leave to amend had been made as required by this section. Nationwide Mut. Ins. Co. v. Canada Dry Bottling Co., 268 N.C. 503, 151 S.E.2d 14 (1966).

Applied in Carolina Builders Corp. v. New Amsterdam Cas. Co., 236 N. C 513, 73 S. E. (2d) 155 (1952); Stamey v. Rutherfordton Electric Membership Corp., 247 N. C. 640, 101 S. E. (2d) 814 (1958); Yeager v. Dobbins, 252 N. C. 824, 114 S. E. (2d) 820 (1960); Fulton v. Talbert, 255 N. C. 183, 120 S. E. (2d) 410 (1960); Hunnicutt v. Shelby Mut. Ins. Co., 255 N. C. 515, 122 S. E. (2d) 74 (1961); Strickland v. Jackson, 260 N.C. 190, 132 S.E.2d 338 (1963); Stegall v. Catawba Oil Co., 260 N.C. 459, 133 S.E.2d 138 (1963); Stegall v. Catawba Oil Co., 260 N.C. 468, 133 S.E.2d 145 (1963); Stegall v. Catawba Oil Co., 260 N.C. 469, 133 S.E.2d 146 (1963); Spartan Equip. Co. v. Air Placement Equip. Co., 263 N.C. 549, 140 S.E.2d 3 (1965); High Point Surplus Co. v. Pleasants, 263 N.C. 587, 139 S.E.2d 892 (1965); McDaniel v. Fordham, 264 N.C. 62, 140 S.E.2d 736 (1965); Cobb v. Clark, 257 F. Supp. 175 (M.D.N.C. 1966); Woodward v. Carteret County, 270 N.C. 55, 153 S.E.2d 809 (1967); Hout v. Harvell, 270 N.C. 274, 154 S.E.2d 41 (1967).

Cited in Shives v. Sample, 238 N. C. 724, 79 S. E. (2d) 193 (1953); Loving v. Whitton, 241 N. C. 273, 84 S. E. (2d) 919 (1954); Broadway v. Asheboro, 250 N. C. 232, 108 S. E. (2d) 441 (1959); Jones v. Mathis, 254 N. C. 421, 119 S. E. (2d) 200 (1961); Upchurch v. Raleigh, 252 N. C. 676, 114 S. E. (2d) 772 (1960); Ingram v. Nationwide Mut. Ins. Co., 258 N. C. 632, 129 S. E. (2d) 222 (1963); Murphy v. Murphy, 261 N.C. 95, 134 S.E.2d 148 (1964).

§ 1-132. Division of actions when misjoinder.

Court Will Sever Causes Improperly United.—

In accord with 1st paragraph in original. See Tart v. Byrne, 243 N. C. 409, 90 S. E. (2d) 692 (1956).

In accord with 2nd paragraph in original. See Mills v. Carolina Cemetery Park Corp., 242 N. C. 20, 86 S. E. (2d) 893 (1955); McKinley v. Hinnant, 242 N. C. 245, 87 S. E. (2d) 568 (1955).

Misjoinder of Causes and Parties.—

In accord with 1st paragraph in original. See Gaines v. Atlas Plywood Corp., 253 N. C. 191, 116 S. E. (2d) 427 (1960).

In accord with 2nd paragraph in original. See Erickson v. Starling, 233 N. C. 539, 64 S. E. (2d) 832 (1951); Sellers v. Motors Ins. Corp., 233 N. C. 590, 65 S. E. (2d) 21 (1951); McKinley v. Hinnant, 242 N. C. 245, 87 S. E. (2d) 568 (1955); Joyner v. McDowell County Board of Education, 244 N. C. 164, 92 S. E. (2d) 795 (1956).

Where there is misjoinder of parties and causes of action, the action must be dismissed upon demurrer. Bannister & Sons v. Williams, 261 N.C. 586, 135 S.E.2d 572 (1964).

§ 1-133. Grounds not appearing in complaint.

Pendency of Another Suit.—

In accord with 1st paragraph in original. See McDowell v. Blythe Bros. Co., 236 N. C. 396, 72 S. E. (2d) 860 (1952); Buchanan v. Smawley, 246 N. C. 592, 99 S. E. (2d) 787 (1957); Wallace v. Johnson, 251 N. C. 11, 110 S. E. (2d) 488 (1959).

In accord with 2nd paragraph in original. See Perry v. Owens, 257 N. C. 98, 125 S. E. (2d) 287 (1962).

In an action between the respective drivers of the cars involved in a collision, each driver sought to recover damages to his vehicle upon allegations that the collision was the result of the negligence of the other. Thereafter, the passenger in one of the vehicles sued the driver of the other vehicle to recover for personal injuries It was held that the defendant in the first action, joined in the second action for contribution, was not entitled to set up as a cross action the identical matter asserted by him in the prior action, and the plea in abatement by the other defendant in the second action should have been allowed. Demoret v. Lowery, 252 N. C. 187, 113 S. E. (2d) 199 (1960).

Quoted in J. A. Jones Constr. Co. v.

Local Union 755, etc., 246 N. C. 481, 98 S. E. (2d) 852 (1957).

Cited in Flynt v. Flynt, 237 N. C. 754, 75 S. E. (2d) 901 (1953); Hill v. Hill Spinning Co., 244 N. C. 554, 94 S. E. (2d) 677 (1956); Rudisill v. Hoyle, 254 N. C. 33, 118 S. E. (2d) 145 (1961); Rhyne v. Clark, 255 N. C. 418, 121 S. E. (2d) 606 (1961); Thomas v. Thomas, 259 N. C. 461, 130 S. E. (2d) 871 (1963).

§ 1-134. Objection waived.

Same—In the Supreme Court.—

Demurrer ore tenus on the ground that the complaint fails to state facts sufficient to constitute a cause of action may be filed in the Supreme Court. Howze v. McCall, 249 N. C. 250, 106 S. E. (2d) 236 (1958).

Lack of Jurisdiction.—

In accord with 2nd paragraph in original. See Anderson v. Atkinson, 235 N. C. 300, 69 S. E. (2d) 603 (1952).

A defect in jurisdiction over the subject matter cannot be cured by waiver, consent, amendment or otherwise. Anderson v. Atkinson, 235 N. C. 300, 69 S. E. (2d) 603 (1952)

The filing of an answer waives the right to demur for misjoinder of parties and causes of action. Bannister & Sons v. Williams, 261 N.C. 586, 135 S.E.2d 572 (1964).

The objection that a prior action is pending between the same parties for the same cause is waived unless it is raised in the mode appointed by law. McDowell v. Blythe Bros. Co., 236 N. C. 396, 72 S. E. (2d) 860 (1952).

Demurrer after Answer.—

Where additional parties, joined for contribution under G. S. 1-240, file answer, they are precluded from thereafter demurring ore tenus for misjoinder of parties and causes, but plaintiffs, seeking no relief against such additional defendants, are not precluded thereby from demurring ore tenus on such ground. McBryde v. Coggins-McIntosh Lumber Co., 246 N. C. 415, 98 S. E. (2d) 663 (1957).

Where the record shows that the court had jurisdiction over the subject matter of the action and of the parties, and a study of the complaint shows that it states facts sufficient to constitute a cause of action, the complaint cannot be overthrown by a demurrer ore tenus after answer by defendants has been filed. Short v. Central Bus Sales Corp., 259 N. C. 133, 129 S. E. (2d) 887 (1963).

Applied in Spartan Equip. Co. v. Air Placement Equip. Co., 263 N.C. 549, 140 S.E.2d 3 (1965).

Cited in Flynt v. Flynt, 237 N. C. 754, 75 S. E. (2d) 901 (1953); Adams v. Flora Macdonald College, 247 N. C. 648, 101 S. E. (2d) 809 (1958); Williams v. Strickland, 251 N. C. 767, 112 S. E. (2d) 533 (1960); Thomas v. Thomas, 259 N. C. 461, 130 S. E. (2d) 871 (1963).

Article 15.

Answer.

§ 1-134.1. Special appearances eliminated.

Editor's Note.—For case law survey on process and waiver of invalidity, see 41 N. C. Law Rev. 524.

Challenge on other grounds does not waive the objection to jurisdiction since the enactment of this section. Ward v. Kolman Mfg. Co., 267 N.C. 131, 148 S.E.2d 27 (1966).

Objection to Jurisdiction after Extension of Time to Plead. — Defendant labor union, which interposed no objection to the jurisdiction of the court until after it had applied for and had obtained an extension of time in which to plead, waived any irregularity in or lack of service of process. Youngblood v. Bright, 243 N. C. 599, 91 S. E. (2d) 559 (1956).

General Appearance. — Where a defendant served by publication and attachment files answer denying the material allegations of the complaint and moves to dismiss for want of valid service and thereafter plaintiff files an additional affidavit upon which an alias summons is issued and order of service by publication is entered, defendant's subsequent demurrer for failure of the complaint to state a cause of action, without attempting to protect and preserve his rights in regard to the second attachment and publication, constitutes a general appearance, giving the court jurisdiction. Bright v. Williams, 245 N. C. 648, 97 S. E. (2d) 247 (1957).

Applied in Shaver v. Shaver, 244 N. C. 311, 93 S. E. (2d) 615 (1956); Harris v. Upham, 244 N. C. 477, 94 S. E. (2d) 370 (1956); Finch v. Small Business Administration of Richmond, Virginia, 252 N. C.

50, 112 S. E. (2d) 737 (1960); Trinity Methodist Church v. Miller, 260 N.C. 331, 132 S.E.2d 688 (1963).

Cited in Harris v. Harris, 257 N. C. 416, 126 S. E. (2d) 83 (1962); Murphy v. Murphy, 261 N.C. 95, 134 S.E.2d 148 (1964).

§ 1-135. Contents.

I. IN GENERAL.

The function of a pleading is to inform an adversary what facts are claimed to constitute the defense. Sorrell v. Moore, 251 N. C. 852, 112 S. E. (2d) 254 (1960).

Facts Not Pleaded Cannot Be Shown.—A party is not permitted to show facts constituting a defense which he has not pleaded. Sorrell v. Moore, 251 N. C. 852, 112 S. E. (2d) 254 (1960).

Sufficiency of Answer.—If the answer gives notice of the facts asserted for the defense, it has served its purpose. Sorrell v. Moore, 251 N. C. 852, 112 S. E. (2d) 254 (1960).

Courses Open to Defendant.—The only pleading on the part of the defendant is either a demurrer or an answer. If he elects to answer he must either admit or deny the several allegations contained in the complaint. In addition he may allege new matter (1) in confession and avoidance, or (2) as a setoff, or (3) as an affirmative defense, or (4) as a cross action or counterclaim. Spain v. Brown, 236 N. C. 355, 72 S. E. (2d) 918 (1952).

Precision and Particularity in Alleging Defenses.—

In accord with 1st paragraph in original. See Perkins v. Perkins, 249 N. C. 152, 105 S. E. (2d) 663 (1958).

Cited in Commercial Finance Co. v. Holder, 235 N. C. 96, 68 S. E. (2d) 794 (1952); Wilson v. Chandler, 235 N. C. 373, 70 S. E. (2d) 179 (1952); Neal v. Marrone, 239 N. C. 73, 79 S. E. (2d) 239 (1953); Murray v. Wyatt, 245 N. C. 123, 95 S. E. (2d) 541 (1956); Smith v. Moore, 254 N. C. 186, 118 S. E. (2d) 436 (1961); Dawson Constr. Co. v. Hyde County Board of Education, 254 N. C. 311, 118 S. E. (2d) 753 (1961); Jarrett v. Brogdon, 256 N. C. 693, 124 S. E. (2d) 850 (1962); Jewell v. Price, 259 N. C. 345, 130 S. E. (2d) 668 (1963).

III. NEW MATTER IN DEFENSE.

May Constitute Both Defense and Counterclaim.—The new matter alleged in an answer in a particular case may constitute both an affirmative defense and a counterclaim. Wells v. Clayton, 236 N. C. 102, 72 S. E. (2d) 16 (1952).

This section is specific in directing "ordinary and concise language, without repetition" when stating an affirmative defense. Etheridge v. Carolina Power & Light Co., 249 N. C. 367, 106 S. E. (2d) 560 (1959).

Facts Should Be Alleged with Same Clearness and Conciseness as in Complaint.—The answer must contain any new matter relied on by the defendant as constituting an affirmative defense under this section. Setting forth new matter as a defense is an affirmative pleading on the part of the defendant and the facts should be alleged with the same clearness and conciseness as in the complaint. Cohoon v. Swain, 216 N. C. 317, 5 S. E. (2d) 1 (1939); Smith v. Smith, 249 N. C. 669, 107 S. E. (2d) 530 (1959).

Asserting Governmental Immunity. — If a railroad company in changing the grade of a street beyond its right of way, incident to the restoration of the street after changing the elevation of its tracks at a grade crossing, asserts the municipality's governmental immunity, it must plead the facts which would relieve it of liability on this ground. Thompson v. Seaboard Air Line R. Co., 248 N. C. 577, 104 S. E. (2d) 181 (1958).

§ 1-137. Counterclaim.

I. IN GENERAL.

Editor's Note.—

For case law survey on pleading and parties, see 43 N.C.L. Rev. 873 (1965).

Liberal Construction.—

In accord with 1st paragraph in original. See Standard Amusement Co. v. Tarkington, 247 N. C. 444, 101 S. E. (2d) 392 (1958).

While this section is designed to enable parties litigant to settle well-nigh any and every phrase of a given controversy in one and the same action, that a connected story may be told is not alone sufficient, nor is more historical sequence all that is required to permit a counterclaim. Burton v. Dixon, 259 N. C. 473, 131 S. E. (2d) 27 (1963).

More Comprehensive than the Old Set-Off.—

In accord with 2nd paragraph in original. See Etheridge v. Wescott, 244 N. C. 637, 94 S. E. (2d) 846 (1956); Auto Finance Co. v. Simmons, 247 N. C. 724, 102 S. E. (2d) 119 (1958).

Counterclaim by One of Several Defendants. — Where the action is joint in form, it is permissible for one of several defendants to allege a counterclaim solely in its favor, if the liability of such defendant, in respect of plaintiff's claim, is several, or joint and several. Burns v. Gulf Oil Corp., 246 N. C. 266, 98 S. E. (2d) 339 (1957).

If the counterclaim is otherwise permissible, and the liability of the defendant who asserts it is several, or joint and several, the mere form of plaintiff's action should not and does not operate to deprive such defendant of the statutory right to interpose such counterclaim. Burns v. Gulf Oil Corp., 246 N. C. 266, 98 S. E. (2d) 339 (1957).

Counterclaims Permissible under Both Subsections (1) and (2).—In an action on contract, the defendant may, under subsection (1) of this section, set up as a counterclaim a cause of action arising out of the contract sued on and may, under subsection (2), also set up the breach of an entirely different and distinct contract existing at the commencement of the action. General Rubber & Tire Co. v. Distributors, Inc., 251 N. C. 406, 111 S. E. (2d) 614 (1959).

A several judgment may be had on a counterclaim within the purview of the statute when judgment may be rendered for the plaintiff, or all of the plaintiffs, if more than one, or for the defendant, or all of the defendants, if more than one, accordingly as the court may decide in favor of the one side or the other. Garrett v. Rose, 236 N. C. 299, 72 S. E. (2d) 843 (1952); Burton v. Dixon, 259 N. C. 473, 131 S. E. (2d) 27 (1963).

In a daughter's action against the estate of her father to recover for personal services rendered her father prior to his death, the personal representatives' counterclaim alleging that the daughter and her husband conspired to obtain control of her father's property, and pursuant thereto the husband procured power of attorney under which he sold merchantable timber and converted the proceeds to their use, was held to meet the requirements of this section that a several judgment must be permissible on a counterclaim. Burton v. Dixon, 259 N. C. 473, 131 S. E. (2d) 27 (1963).

Applied in Moore v. Parkerson, 255 N. C. 342, 121 S. E. (2d) 533 (1961); City of Charlotte v. Spratt, 263 N.C. 656, 140 S.E.2d 341 (1965).

Cited in Spain v. Brown, 236 N. C. 355, 72 S. E. (2d) 918 (1952); Hill v. Hill Spinning Co., 244 N. C. 554, 94 S. E. (2d) 677 (1956).

II. CLAIMS ARISING OUT OF PLAINTIFF'S DEMAND.

A. General Rules and Instances.

The purpose and intent of the first subsection of this section is to permit the trial in one action of all causes of action arising out of any one contract or transaction. Standard Amusement Co. v. Tarkington, 247 N. C. 444, 101 S. E. (2d) 398 (1958); General Tire & Rubber Co. v. Distributors, Inc., 251 N. C. 406, 111 S. E. (2d) 614 (1959).

Counterclaim for Independent Tort, etc.—

In an action for malicious prosecution or false arrest, the defendant cannot interpose a counterclaim for a distinct tort committed by the plaintiff against him, even though that tort is the offense for which he had unsuccessfully prosecuted the plaintiff or caused his arrest Kersey v. Smith, 252 N. C. 468, 114 S. E. (2d) 117 (1960).

When Cause of Action Must Be Asserted by Way of Counterclaim. — A defendant may plead his cause of action as a counterclaim in plaintiff's action or institute a separate action thereon, but where the issues raised in the plaintiff's action, if answered in his favor, will necessarily establish facts sufficient to defeat the defendant's cause of action, the defendant must assert his cause of action by way of counterclaim in the plaintiff's action. Bullard v. Berry Coal & Oil Co., 254 N. C. 756, 119 S. E. (2d) 910 (1961); Manning v. Hart, 255 N. C. 368, 121 S. E. (2d) 721 (1961).

Debtor May Set Up Either Demand for Damages or Demand for Specific Enforcement of Accord.—When a defaulting creditor sues the debtor to enforce his original claim, the debtor may set up either a demand for damages for the breach of the accord or a demand for its specific enforcement as a counterclaim. Either of these demands meets the twofold requirement of the counterclaim statute embodied in the first subdivision of this section. Dobias v. White, 239 N. C. 409, 80 S. E. (2d) 23 (1954).

Tort against Contract Claim.—

In accord with 1st paragraph in original. See Burton v. Dixon, 259 N. C. 473, 131 S. E. (2d) 27 (1963).

In accord with 2nd paragraph in original. See King v. Libbey, 253 N. C. 188, 116 S. E. (2d) 339 (1960).

Contract against Tort Claim.—

Where the cause of action set out in plaintiff's complaint sounds in tort for conversion of funds, and the causes of action set out by defendant, by way of counterclaim, are in contract, and do not arise out of transactions set forth in the complaint as the foundation of plaintiff's complaint, nor are they connected with the subject of the action, neither cause of action set up by defendant may be properly pleaded as a counterclaim to plaintiff's cause of action. Commercial Finance Co. v. Holder, 235 N. C. 96, 68 S. E. (2d) 794 (1952).

Plaintiff alleged that he was distributor of defendant corporation's goods under contract, that defendant corporation and certain of its named employees entered a conspiracy to injure plaintiff in his reputation and interfere with plaintiff's business under the contract. Defendant corporation filed counterclaims, alleging: First, that plaintiff wrongfully interfered with the contractual relationship between the corporate defendant and its retail customers; second, that plaintiff wrongfully and carelessly removed equipment owned by the corporate defendant from the premises of its customers; and third, that plaintiff wrongfully converted to its own use certain underground storage tanks belonging to the corporate defendant. It was held that while plaintiffs action was in tort, the respective rights and obligations of plaintiff and the corporate defendant in regard to the action and counterclaims arose from and were determined by the contractual relationship subsisting between them, and therefore, the counterclaims were permissible under this section. Burns v. Gulf Oil Corp., 246 N. C. 266, 98 S. E. (2d) 339 (1957).

What Constitutes "Subject of the Action."—

The term "subject of the action," as used in this section, denotes the thing in respect to which the plaintiff's right of action is asserted, such as the wrongful act for which damage is sought, or the contract which is broken, or the threatened act which is sought to be restrained, or the property which is sought to be recovered. Garrett v. Rose, 236 N. C. 299, 72 S. E. (2d) 843 (1952); Burton v. Dixon, 259 N. C. 473, 131 S. E. (2d) 27 (1963).

Action to Cancel Contract to Convey as Cloud on Title.—The owner of lands executed a deed to one person and a contract to convey to another. The grantee was joined as a party plaintiff in an action to cancel the contract as a cloud on title, and defendant set up a counterclaim for specific performance or return of the purchase price paid, with interest. It was held that the contract to convey was the sole basis of plaintiffs' action and defendant's counterclaim, and therefore, the counterclaim could be set up in the action, even though recovery of the purchase price was not sought and could not be had as against plaintiff grantee in any event. Etheridge v. Wescott, 244 N. C. 637, 94 S. E. (2d) 846 (1956).

To Be "Connected with the Subject," etc.—

In accord with original. See Thompson v. Pilot Life Ins. Co., 234 N. C. 434, 67 S. E. (2d) 444 (1951).

To be connected with the subject of action, the connection of the case asserted in the counterclaim and the subject of the action must be immediate and direct, and presumably contemplated by the parties. Burton v. Dixon, 259 N. C. 473, 131 S. E. (2d) 27 (1963).

In respect to the phrase "connected with the subject of the action," the connection must be immediate and direct; the connection must be such that the parties could be supposed to have foreseen and contemplated it in their mutual acts; in other words, that the parties mus be assumed to have had this connection and its consequences in view when they dealt with each other. Burton v. Dixon, 259 N. C. 473, 131 S. E. (2d) 27 (1963).

What Constitutes "Arising Out of Same Transaction."—

A counterclaim based on tort, in order to be pleadable, must have arisen at the time and out of the facts and circumstances which constitute the plaintiff's cause of action. Kersey v. Smith, 252 N. C. 468, 114 S. E. (2d) 117 (1960).

In a daughter's action against her father's estate to recover for personal services rendered her father, the defendant executor was permitted to set up a counterclaim against her for civil conspiracy between her and her husband pursuant to which the husband obtained a power of attorney and sold merchantable timber belonging to her father and converted the proceeds to their own use, since the counterclaim was connected with the subject of the plaintiff's action and was so related thereto that adjustment of both was necessary in a full and final determination of the controversy. Burton v. Dixon, 259 N. C. 473, 131 S. E. (2d) 27 (1963).

Same — Counterclaim for Malicious Prosecution.—

If a counterclaim cannot be maintained in an action for malicious prosecution,

based on the tort which was the basis for the unsuccessful prosecution, it would seem equally clear that a counterclaim for malicious prosecution is not pleadable in an action based on assault and battery, where the facts constituting the alleged cause of action for malicious prosecution had not arisen at the time plaintiff's cause of action arose. Kersey v. Smith, 252 N. C. 468, 114 S. E. (2d) 117 (1960).

The cross action must have such relation to plaintiff's claim, etc.—

In accord with 1st paragraph in original. See General Tire & Rubber Co. v. Distributors, Inc., 251 N. C. 406, 111 S. E. (2d) 614 (1959).

In accord with 2nd paragraph in 1961 Supplement. See Burton v. Dixon, 259 N. C. 473, 131 S. E. (2d) 27 (1963).

The cross action must be so related to the matters alleged in the complaint that an adjustment of both is necessary to a full determination of the controversy. Thompson v. Pilot Life Ins. Co., 234 N. C. 434, 67 S. E. (2d) 444 (1951).

Where defendants' cross action is so interwoven in plaintiff's cause of action that a complete story as to one cannot be told without telling the essential facts as to the other, and has such relation to plaintiff's claim that the adjustment of both is necessary to a full and final determination of the controversy, the cross action is authorized by this section. Standard Amusement Co. v. Tarkington, 247 N. C. 444, 101 S. E. (2d) 398 (1958).

The cross action must have such relation to the plaintiffs' claim that the adjustment of both is necessary to a full and final determination of the controversy. This means that it must be so interwoven in plaintiffs' cause of action that a full and complete story as to the one cannot be told without relating the essential facts as to the other. Burton v. Dixon, 259 N. C. 473, 131 S. E. (2d) 27 (1963).

Cross Actions as between Joint Tort-Feasors.—Where all joint tort-feasors are brought in by a plaintiff and a cause of action is stated against all of them, such defendants under this section and § 1-138 are permitted to set up in their respective answers as many defenses and counterclaims as they may have arising out of the causes of action set out in the complaint. However, they are not allowed to set up and maintain cross actions as between themselves which involve affirmative relief not germane to the plaintiff's action This is so, notwithstanding the fact that the defendant's claim for damages may have arisen out of the same set of circumstances upon which the plaintiff's action is bottomed. Bell v. Lacey, 248 N. C. 703, 104 S. E. (2d) 833 (1958); Greene v. Charlotte Chemical Laboratories, Inc., 254 N. C. 680, 120 S. E. (2d) 82 (1961); Streater v. Marks, 267 N.C. 32, 147 S.E.2d 529 (1966).

In an action against two defendants to recover for negligent injury, a cross action against one defendant by the other may not be maintained when the cross action is based on an express contract between the defendants obligating the one to indemnify the other from losses resulting from the activities of indemnitor in performing or supervising the work out of which plaintiff's injuries arose. Steele v. Moore-Flesher Hauling Co., 260 N.C. 486, 133 S.E.2d 197 (1963).

Allegations Constituting Counterclaim in Action of Ejectment. — See Garrett v. Rose, 236 N. C. 299, 72 S. E. (2d) 843 (1952).

Allegations Not Constituting Counterclaim in Action of Ejectment.—In an action for trespass and for injunctive relief against further trespass, allegations in the answer of a defendant that he is the owner and in possession of a described tract of land and that insofar as plaintiff's description covers any of the land described in the answer, the allegations of the complaint are untrue and denied, fail to set up a counterclaim so as to preclude plaintiffs from taking voluntary nonsuit as to such defendant. Everett v. Yopp, 247 N. C. 38, 100 S. E. (2d) 221 (1957).

This section determines what is a proper counterclaim as the word is used in Session Laws 1955, c. 971, s. 4, Rule 25 (c) (4), relating to the transfer of actions from the municipal-county court in Guilford County to the superior court, where a counterclaim is filed which is beyond the jurisdiction of the municipal-county court. Standard Amusement Co. v Tarkington, 247 N. C. 444, 101 S. E. (2d) 398 (1958).

III. CLAIMS ARISING OUT OF INDEPENDENT CONTRACT.

A. General Rules and Instances.

When Subsection (2) Applicable.—Subsection (2) of this section is applicable where, in an action on a contract, the breach of an entirely different and distinct contract is set up by defendant. General Tire & Rubber Co. v. Distributors, Inc., 251 N. C. 406, 111 S. E. (2d) 614 (1959).

Need Not Arise out of Same Transaction.—

Where plaintiff's action is on contract, and defendant's counterclaim exists at the commencement of the action and is on contract, it is not required that such counterclaim relate to the contract or transaction set forth in the complaint "as the foundation of the plaintiff's claim or connected with the subject of the action." In such case, subsection 2 rather than subsection 1 of this section controls. Commercial Credit Corp. v. Robeson Motors, Inc., 243 N. C. 326, 90 S. E. (2d) 886 (1956).

A counterclaim permissible under subsection (2) of this section need not relate to the contract or transaction set forth in the complaint. General Tire & Rubber Co. v. Distributors, Inc., 251 N. C. 406, 111 S. E. (2d) 614 (1959).

Penalty for Usurious Interest. — Construing G. S. 24-6 and subsection 2 of this section in pari materia, where a lender brings an action to recover on a note or other evidence of debt, the borrower, by counterclaim in such action, can recover the penalty for usurious interest paid by the borrower to the lender in connection with separate and independent transactions between them. Commercial Credit Corp. v. Robeson Motors, Inc., 243 N. C. 326, 90 S. E. (2d) 886 (1956).

There is no conflict between subsection 2 of this section and G. S. 24-2 in reference to pleading of a counterclaim for usury. Commercial Credit Corp. v. Robeson Motors, Inc., 243 N. C. 326, 90 S. E. (2d) 886 (1956).

Counterclaim of Guarantor.—In an action by the seller against the purchaser and the guarantor of payment, the guarantor is entitled to set up a counterclaim against the seller for the amount the guarantor paid the seller under a separate contract for engineering, designing, and fabricating a mechanical model upon allegations that the model was totally worthless for the purpose for which constructed. Perfecting Serv. Co. v. Product Dev. & Sales Co., 261 N.C. 660, 136 S.E.2d 56 (1964).

B. Time of Existence.

In General.—

This section does not require that a counterclaim must be one existing at the commencement of the plaintiff's action except in the case of a counterclaim arising out of contract. Cameron v. Cameron, 235 N. C. 82, 68 S. E. (2d) 796 (1952).

Under this section a counterclaim, etc.—

In accord with 2nd paragraph in original. See Commerce Mfg. Co. v. Blue Jeans Corp., 146 F. Supp. 15 (1956).

IV. PLEADING AND PRACTICE.

A. Rules of Pleading.

Facts Taken as True in Determining Whether Counterclaim Permissible. — Facts alleged by defendant as the basis for its counterclaims must be taken as true in determining whether the counterclaims are permissible under the statute. Burns v. Gulf Oil Corp., 246 N. C. 266, 98 S. E. (2d) 339 (1957).

C. Jurisdictional Amount.

Jurisdictional Amount for Counterclaims.—For note on problem arising from counterclaim exceeding jurisdictional limit of court, and suggested remedy by way of proposed change in this section, see 32 N. C. Law Rev. 231.

§ 1-138. Several defenses.

Contradictory Defenses.—

Under this section, a defendant may set up and rely upon contradictory defenses. Modern Electric Co., Inc. v. Dennis, 255 N. C. 64, 120 S. E. (2d) 533 (1961).

Defendant may set up a counterclaim which is permissible to any one of the causes of action alleged by plaintiff without regard to whether plaintiff separately alleges such cause. Burns v. Gulf Oil Corp., 246 N. C. 266, 98 S. E. (2d) 339 (1957).

Defenses and Counterclaims of Joint Tort-Feasors.—Where all joint tort-feasors are brougnt in by a plaintiff and a cause of action is stated against all of them, such defendants under this section and § 1-137 are permitted to set up in their respective answers as many defenses and counterclaims as they may have arising out of the causes of action set out in the complaint. However, they are not allowed to set up and maintain cross actions as between themselves which involve affirmative relief not germane to the plaintiff's action. This is so, notwithstanding the fact that the defendant's claim for damages may have arisen out of the same set of circumstances upon which the plaintiff's action is bottomed. Bell v. Lacey, 248 N. C. 703, 104 S. E. (2d) 833 (1958); Greene v. Charlotte Chemical Laboratories, Inc., 254 N. C. 680, 120 S. E. (2d) 82 (1961); Streater v. Marks, 267 N.C. 32, 147 S.E.2d 529 (1966).

In an action against two defendants to recover for negligent injury, a cross action against one defendant by the other may not be maintained when the cross action is based on an express contract between the defendants obligating the one to indemnify the other from losses resulting from the activities of indemnitor in performing or supervising the work out of which plaintiff's injuries arose. Steele v. Moore-Flesher Hauling Co., 260 N.C. 486, 133 S.E.2d 197 (1963).

Defendant cannot plead contributory negligence by reference to his counterclaim. Hines v. Frink, 257 N. C. 723, 127 S. E. (2d) 509 (1962).

Failure to Distinguish between Allegations Relating to Cross Action and Those Relating to Counterclaim.—Where the facts were alleged in a series of paragraphs, without any satisfactory attempt to distinguish between those relating to the cross action and those relating to the counterclaim, a demurrer was sustained. Perfecting Serv. Co. v. Product Dev. & Sales Co., 261 N.C. 660, 136 S.E.2d 56 (1964).

§ 1-139. Contributory negligence pleaded and proved.

The defendant must meet the two requirements of this section to obtain the benefit of the affirmative defense of contributory negligence. The first requirement is that the defendant must specially plead in his answer an act or omission of the plaintiff constituting contributory negligence in law; and the second requirement is that the defendant must prove on the trial the act or omission of the plaintiff so pleaded. Hunt v. Wooten, 238 N. C. 42, 76 S. E. (2d) 326 (1953); Murray v. Wyatt, 245 N. C. 123, 95 S. E. (2d) 541 (1956); Farmers Oil Co. v. Miller, 264 N.C. 101, 141 S.E.2d 41 (1965).

The plea of contributory negligence is an affirmative defense, and when relied upon by defendant, this section puts the burden of proving it on the defendant. James v. Atlantic & East Carolina R. Co., 223 N. C. 591, 65 S. E. (2d) 214 (1951).

The plea of contributory negligence is an affirmative defense, and when relied upon as a defense, it must be set up in the answer and proved on the trial. Rodgers v. Thompson, 256 N. C. 265, 123 S. E. (2d) 785 (1962).

Contributory negligence must be pleaded in the answer and proved on the trial, etc.—

The first requirement is that the defendant must specially plead in his answer an act or omission of the plaintiff constituting contributory negligence in law; and the second requirement is that the defendant must prove on the trial the act or omission of the plaintiff so pleaded. Allegation without proof and proof without allegation are equally unavailing to the defendant. Rodgers v. Thompson, 256 N. C. 265, 123 S. E. (2d) 785 (1962).

A defendant must prove contributory negligence substantially as alleged in his answer. Moore v. Hales, 266 N.C. 482, 146 S.E.2d 385 (1966).

Defendant must plead contributory negligence, etc.—

Contributory negligence is an affirmative defense which must be pleaded. It cannot be raised by demurrer to the complaint. Walston v. Greene, 247 N. C. 693, 102 S. E. (2d) 124 (1958).

A defendant, relying upon contributory negligence for his defense, must allege in his answer facts which, if true, constitute negligence by the plaintiff and must prove the negligence so alleged. Jones v. Holt, 268 N.C. 381, 150 S.E.2d 759 (1966).

A demurrer to the complaint on the ground of contributory negligence, etc. —

In accord with original. See Skipper v. Cheatham, 249 N. C. 706, 107 S. E. (2d) 625 (1959); Boykin v. Bennett, 253 N. C. 725, 118 S. E. (2d) 12 (1961).

Plea Must Aver Facts to Which Law Attaches Negligence.—To be sufficient, a plea of contributory negligence must aver a state of facts to which the law attaches negligence as a conclusion. One relying on contributory negligence must prove facts from which the inference of contributory negligence may be drawn by men of ordinary reason. Evidence which raises a mere conjecture is insufficient for the jury. Bruce v. O'Neal Flying Service, 234 N. C. 79, 66 S. E. (2d) 312 (1951)

A plea of contributory negligence must allege negligent acts or omissions on the part of the plaintiff which contributed to his injury as one of its proximate causes. Moore v. Hales, 266 N.C. 482, 146 S.E.2d 385 (1966).

Negligence is not presumed from the mere fact that one is killed. Goodson v. Williams, 237 N. C. 291, 74 S. E. (2d) 762 (1953).

Motion for Nonsuit.—

In accord with original. See Donlop v. Snyder, 234 N. C. 627, 68 S. E. (2d) 316 (1951); Gibson v. Whitton, 239 N. C. 11, 79 S. E. (2d) 196 (1953); Pruett v. Inman, 252 N. C. 520, 114 S. E. (2d) 360 (1960); Smith v. Rawlins, 253 N. C. 67, 116 S. E. (2d) 184 (1960); Carswell v. Lackey, 253 N. C. 387, 117 S. E. (2d) 51 (1960).

Contributory negligence is an affirmative defense which the defendant must plead and prove; however, the rule is firmly embedded in the adjective law of this State that a defendant may avail himself of his plea of contributory negligence by a motion for a compulsory judgment of nonsuit under § 1-183 when, and only when, the facts necessary to show contributory negligence are established so clearly by plaintiff's own evidence that no other conclusion can be reasonably drawn therefrom. Rouse v. Peterson, 261 N.C. 600, 135 S.E.2d 549 (1964), citing Pruett v. Inman, 252 N.C. 520, 114 S.E.2d 360 (1960); Wells v. Johnson, 269 N.C. 192, 152 S.E.2d 229 (1967).

A motion for nonsuit on the ground of contributory negligence shown by the plaintiff's evidence will be allowed only when the evidence is so clear that no other reasonable inference is deducible therefrom. Donlop v Snyder, 234 N C. 627, 68 S. E. (2d) 316 (1951); Goodson v. Williams, 237 N. C. 291, 74 S. E. (2d) 762 (1953); Carrigan v. Dover, 251 N. C. 97, 110 S. E. (2d) 825 (1959).

The court cannot allow a motion for judgment of nonsuit on the ground of contributory negligence on the part of the plaintiff in actions for personal injury, or of the decedent in actions for wrongful death, if it is necessary to rely either in whole or in part on testimony offered by the defense to sustain the plea of contributory negligence. Pruett v. Inman, 252 N. C. 520, 114 S. E. (2d) 360 (1960).

A defendant may not avail himself of his plea of contributory negligence by a motion for a compulsory judgment of nonsuit under § 1-183, unless the facts necessary to show contributory negligence are established so clearly by plaintiff's own evidence that no other conclusion can be reasonably drawn therefrom. Rodgers v. Thompson, 256 N. C. 265, 123 S. E. (2d) 785 (1962).

Only when plaintiff proves himself out of court is he to be nonsuited on the evidence of contributory negligence. Rodgers v. Thompson, 256 N. C. 265, 123 S. E. (2d) 785 (1962).

Since the burden of proof on the issue of contributory negligence is upon the defendant, a motion for judgment of involuntary nonsuit upon that ground should be allowed only when the plaintiff's evidence, considered alone and taken in the light most favorable to him, together with all inferences favorable to him which may reasonably be drawn therefrom, so clearly establishes the defense that no other conclusion can reasonably be drawn. Raper v. Byrum, 265 N.C. 269, 144 S.E.2d 38 (1965).

When the defendant pleads contributory negligence, and plaintiff's own evidence, considered in the light most favorable to him, affirmatively shows such contributory negligence on his part so clearly that no other conclusion can be reasonably drawn therefrom, defendant is entitled to have his motion for judgment of compulsory nonsuit sustained. Wallsee v. Carolina Water Co., 265 N.C. 291, 144 S.E.2d 21 (1965).

A motion for judgment of compulsory nonsuit upon the ground of contributory negligence should be allowed only when the plaintiff's evidence, considered alone and taken in the light most favorable to him, together with inferences favorable to him which may be reasonably drawn therefrom, so clearly establishes the defense of contributory negligence that no other conclusion can reasonably be drawn. Atwood v. Holland, 267 N.C. 722, 148 S.E.2d 851 (1966).

A motion for judgment of nonsuit on the ground of contributory negligence will be granted only when plaintiff's own evidence establishes the facts necessary to show contributory negligence so clearly that no other conclusion can be reasonably drawn therefrom. Bass v. McLamb, 268 N.C. 395, 150 S.E.2d 856 (1966).

The court cannot allow a motion for judgment of compulsory nonsuit, on the ground of contributory negligence on plaintiff's part in an action for damages for personal injury, if it is necessary for the court to rely on any part of the evidence offered by defendant. Wells v. Johnson, 269 N.C. 192, 152 S.E.2d 229 (1967).

Sufficiency of Evidence for Submission to Jury.—The burden of proof being upon the defendant, the issue of contributory negligence should not be submitted to the jury if the evidence is not sufficient to support an affirmative finding. Jones v. Holt, 268 N.C. 381, 150 S.E.2d 759 (1966).

The issue of contributory negligence may not properly be submitted to the jury unless there is evidence from which the inference of contributory negligence may be drawn by men of ordinary reason, evidence which merely raises a conjecture being insufficient. Jones v. Holt, 268 N.C. 381, 150 S.E.2d 759 (1966).

Evidence Considered in Light Most Favorable to Defendant.—While a defendant has the burden of proof on the issue of contributory negligence, he is entitled to have the evidence bearing on that issue considered in the light most favorable to him in determining whether there is suf-

ficient evidence of contributory negligence to be submitted to the jury. Moore v. Hales, 266 N.C. 482, 146 S.E.2d 385 (1966).

In determining the sufficiency of the evidence of contributory negligence to require the submission of that issue to the jury, defendant's evidence must be considered in the light most favorable to him, giving him the benefit of all reasonable inferences in his favor and disregarding plaintiff's evidence except insofar as plaintiff's evidence tends to show negligence on the part of the plaintiff as alleged in the answer as a contributing cause of the injury. Jones v. Holt, 268 N.C. 381, 150 S.E.2d 759 (1966).

Minor between ages of seven and fourteen is presumed to be incapable of contributory negligence. Weeks v. Barnard, 265 N.C. 339, 143 S.E.2d 809 (1965).

But Such Presumption May Be Overcome.—Presumption that a minor between the ages of seven and fourteen is incapable of contributory negligence may be overcome by evidence that the child did not use the care which a child of its age, capacity, discretion, knowledge, and experience would ordinarily have exercised under the same or similar circumstances. Weeks v. Barnard, 265 N.C. 339, 143 S.E.2d 809 (1965).

If a child fails to exercise care and prudence equal to his capacity, and the failure is one of the proximate causes of the injuries in suit, a child cannot recover. Weeks v. Barnard, 265 N.C. 339, 143 S.E.2d 809 (1965).

Cited in State v. Smith, 240 N. C. 99, 81 S. E. (2d) 263 (1954); Green v. Isenhour Brick & Tile Co., 263 N.C. 503, 139 S.E.2d 538 (1965).

Article 16.

Reply.

§ 1-140. Demurrer or reply to answer; where answer contains a counterclaim.

In all cases where the answer of any defendant, whether an original defendant or a defendant subsequently made a party to a pending cause, asks or seeks affirmative relief by way of a cross complaint against any codefendant, whether an original codefendant or a codefendant subsequently made a party to a pending cause, no judgment by default as between said codefendant shall be entered unless and until the defendant against whom affirmative relief is demanded shall have been served with a notice together with a copy of the answer containing such cross complaint, said notice to be issued by the clerk of the court wherein said cause is pending and notifying such defendant that unless a reply to the answer and cross complaint is filed within twenty days from the date of service of notice and answer judgment by default will be entered as provided by law. (1870-71, c. 42, s. 5; Code, s. 208, Rev., s. 484; 1919, c. 304; C. S., s. 524; Ex. Sess. 1920, c. 96, s. 1; Ex. Sess. 1921, c. 92, s. 1; Ex. Sess. 1924, c. 18; 1953, c. 1058.)

Editor's Note.—

The 1953 amendment added the above paragraph to this section. As the first paragraph was not changed it is not set out. For comment on the 1953 amendment, see 31 N. C. Law Rev. 399.

The purpose of a reply is to deny such allegations of the answer as the plaintiff does not admit and to meet new matter set up in the answer. Spain v. Brown, 236 N. C. 355, 72 S. E. (2d) 918 (1952).

When Reply Necessary or Proper.—If the answer contains no new matter, no further pleading is necessary or proper. If, however, the defendant pleads an affirmative defense, setoff, or counterclaim, the plaintiff, if he wishes to raise an issue of fact thereon, may, and under certain conditions must, reply thereto. Spain v. Brown, 236 N. C. 355, 72 S. E. (2d) 918 (1952).

Counterclaim Stating Two or More Causes of Action.—If a counterclaim in fact states two causes of action, when it does not profess to state more than one, it is demurrable. However, unless the contrary plainly appears, it will be assumed that a counterclaim that does not set forth separate statements of more than one cause of action is intended to allege a single cause of action and that intimations of other causes of action are mere embellishments and not germane to the cause of action constituting the heart of the complaint. King v. Libbey, 253 N. C. 188, 116 S. E. (2d) 339 (1960).

Section Applies to Cross Action by One Defendant against Codefendant. — While

this section uses the word "plaintiff", its purpose and intent is to withhold from a defendant any right to a judgment by default on any counterclaim until and unless he gives the alleged debtor legal notice of his claim. And the philosophy underlying the section requires that the rule prescribed be applied to a cross action by one defendant against a codefendant. Boone v. Sparrow, 235 N. C. 396, 70 S. E. (2d) 204 (1952).

Plaintiff May Not Demur to Part of Single Affirmative Defense. — See same catchline under § 1-141.

Applied in General Tire & Rubber Co. v. Distributors, Inc., 251 N. C. 406, 111 S. E. (2d) 614 (1959).

Cited in Wells v. Clayton, 236 N. C. 102, 72 S. E. (2d) 16 (1952); Clapp v. Clapp, 241 N. C. 281, 85 S. E. (2d) 153 (1954); Williams v. Denning, 260 N.C. 539, 133 S.E.2d 150 (1963).

§ 1-141. Content; demurrer to answer.

A reply is a defensive pleading. Its purpose is to support, not to contradict, the complaint. Nix v. English, 254 N. C. 414, 119 S. E. (2d) 220 (1961).

When Answer Demurrable. — This section makes it plain that where an answer contains either in form or in substance a denial of essential allegations of the complaint, the whole answer is not demurrable. It specifies, however, that a demurrer is the proper method by which to determine the sufficiency of an affirmative defense set out in an answer. Erickson v. Starling, 235 N. C. 643, 71 S. E. (2d) 384 (1952).

Whether allegations set forth as the basis for a plea in bar to plaintiff's entire cause of action are sufficient for that purpose may be tested by demurrer. Hardin v. American Mut. Fire Ins. Co., 261 N.C. 67, 134 S.E.2d 142 (1964).

Must Not Be Radically Inconsistent. — In accord with 1st paragraph in original. See Nix v. English, 254 N. C. 414, 119 S. E. (2d) 220 (1961).

The plaintiff cannot in his reply set up a cause of action different from that contained in his complaint. Such a pleading is a departure, and is governed by the provision that the reply must not be inconsistent with the complaint. Nix v. English, 254 N. C. 414, 119 S. E. (2d) 220 (1961).

When Complaint and Reply Inconsistent. — A complaint and a reply are inconsistent within the meaning of this section when they are contrary the one to the other, so that the one is necessarily false if the other is true. Scott v. Jordan, 235 N. C. 244, 69 S. E. (2d) 557 (1952).

Reply in Harmony with Complaint. — A reply in which the plaintiff alleges that the executory contract supporting the defendant's claim to the property in controversy has been abrogated by the mutual agreement of the parties is in complete harmony with the complaint in which the plaintiff asserts that he is the absolute owner of that property. Scott v. Jordan, 235 N. C. 244, 69 S. E. (2d) 557 (1952).

Plaintiff May Not Demur to Part of Single Affirmative Defense.—Plaintiff may demur to one or more defenses pleaded in answer, but he may not divide a single affirmative defense and demur separately to paragraphs or sentences removed from context. Home Improvement Financing Corp. v. Cuthrell, 251 N. C. 75, 110 S. E. (2d) 484 (1959).

When Section Applicable to Pleas of Res Judicata and Estoppel by Judgment.— When the facts constituting the pleas in bar of res judicata and estoppel by judgment are shown on the face of defendant's pleadings, the sufficiency of such pleas may be tested by demurrer under this section or by motion to strike under § 1-126. Troy Lumber Co. v. Hunt, 251 N. C. 624, 112 S. E. (2d) 132 (1960).

A motion to strike defendant's entire further answer and defense on the ground that facts alleged do not constitute a proper defense to plaintiff's action is in substance a demurrer to defendant's further answer and defense. Quick v. High Point Memorial Hosp., Inc., 269 N.C. 450, 152 S.E.2d 527 (1967).

Applied in Jenkins v. Fields, 240 N. C. 776, 84 S. E. (2d) 809 (1954); Bumgardner v. Groover, 245 N. C. 17, 95 S. E. (2d) 101 (1956); Wescott v. State Highway Comm'n, 262 N.C. 522, 138 S.E.2d 133 (1964).

Quoted in part in Williams v. Union County Hospital Ass'n, 234 N. C. 536, 67 S. E. (2d) 662 (1951); Mercer v. Hilliard, 249 N. C. 725, 107 S. E. (2d) 554 (1959).

Stated in Wells v. Clayton, 236 N. C. 102, 72 S. E. (2d) 16 (1952).

Cited in Kelly v. Kelly, 241 N. C. 146, 84 S. E. (2d) 809 (1954); Perfecting Serv. Co. v. Product Dev. & Sales Co., 264 N.C. 79, 140 S.E.2d 763 (1965).

Article 17.

Pleadings, General Provisions.

§ 1-144. Subscription and verification of pleading.

Editor's Note.—For case law survey as to verification of pleading, see 44 N.C.L. Rev. 897 (1966).

A motion is not a pleading within the meaning of this section. Williams v. Denning, 260 N.C. 539, 133 S.E.2d 150 (1963).

Judgment by default may not be entered pending the hearing of a motion to strike, on the ground that the motion was not verified, since a motion is not a pleading within the meaning of this section. Williams v. Denning, 260 N.C. 539, 133 S.E.2d 150 (1963).

The object of the verification is, etc.— In accord with 1st paragraph in original. See Rich v. Norfolk Southern Ry. Co., 244 N. C. 175, 92 S. E. (2d) 768 (1956).

The requirement as to verification, etc.— The requirement of this secton is one which may be waived, except in those cases where the form and substance of the verification is made an essential part of the pleading. Sisk v. Perkins, 264 N.C. 43, 140 S.E.2d 753 (1965).

Whether plaintiff verifies his complaint is optional with him unless some statute requires verification as a condition to the maintenance of the action. Levy v. Meir, 248 N. C. 328, 103 S. E. (2d) 288 (1958).

Effect of Attempted Verification. — Where plaintiff can maintain his action without verifying the complaint, an attempted verification, which is a nullity, cannot defeat that right. Levy v. Meir, 248 N. C. 328, 103 S. E. (2d) 288 (1958).

§ 1-145. Form of verification. — The verification must be in substance that the same is true to the knowledge of the person making it, except as to those matters stated on information and belief, and as to those matters he believes it to be true; and must be by affidavit of the party, or if there are several parties united in interest and pleading together, by one at least of such parties acquainted with the facts, and capable of making the affidavit. (C. C. P., s. 117; 1868-9, c. 159, s. 7; Code, s. 258; Rev., s. 489; C. S., s. 529; 1959, c. 277.)

Editor's Note. — The 1959 amendment substituted "and" in line six for the words "if the party is in the county where the attorney resides and is."

Construction of Section.—The basic rule is that the verification, in substance as prescribed, must be made by each answering party. However, an exception is made when "there are several parties united in interest and pleading together." In such case, the verification must be "by one at least of such parties acquainted with the facts, if the party is in the county where the attorney resides and is capable of making the affidavit." The word "if" as used here is synonymous with "provided." And the word "the" refers to the attorney for the parties who file joint answering pleading. Rich v. Norfolk Southern Ry Co., 244 N. C. 175, 92 S. E. (2d) 768 (1956).

Affiant is not required by this section to subscribe the affidavit. State v. Higgins, 266 N.C. 589, 146 S.E.2d 681 (1966).

This section provides that the verification of pleadings must be by affidavit, but it does not specifically in terms or specifically require that it shall be subscribed by the affiant. State v. Higgins, 266 N.C. 589, 146 S.E.2d 681 (1966).

It is sufficient if the oath is administered by one authorized to administer oaths. State v. Higgins, 266 N.C. 589, 146 S.E.2d 681 (1966).

Joint Pleadings Filed by Individuals.— The wording of this section seems more appropriate in respect of a joint pleading filed by two or more individuals. Rich v. Norfolk Southern Ry. Co., 244 N. C. 175, 92 S. E. (2d) 768 (1956).

Verification by Corporate Defendant Only.—The verification by the vice-president and secretary of the corporate defendant, unchallenged as a proper verification as to the corporate defendant, was not verification by or in behalf of the individual defendants in compliance with this section. Rich v. Norfolk Southern Ry. Co., 244 N. C. 175, 92 S. E. (2d) 768 (1956).

Cited in Reynolds v. Murph, 241 N. C. 60, 84 S. E. (2d) 273 (1954), Bolin v. Bolin, 242 N. C. 642, 89 S. E. (2d) 303 (1955); Myrtle Apartments, Inc. v. Lumbermen's Mut. Cas. Co., 258 N. C. 49, 127 S. E. (2d) 759 (1962).

§ 1-146. Verification by agent or attorney.

Where the plaintiff's verification does not meet the requirement of this section, defendant is not required to verify his answer. Levy v. Meir, 248 N. C. 328, 103 S. E. (2d) 288 (1958).

§ 1-148. Verification before what officer.

Cross Reference.—As to attorney probating papers to be used in proceedings in which he appears as attorney, see § 47-8.

§ 1-150. Items of account; bill of particulars.

Discretion of Court, etc.—

An application for a bill of particulars under this section is addressed to the sound discretion of the trial judge, and his ruling thereon is not reviewable on appeal, except in case of manifest abuse of discretion. Tillis v Calvine Cotton Mills, 236 N C. 533, 73 S. E. (2d) 296 (1952)

Bill of Particulars and Bill of Discovery Are Not Inconsistent Remedies.—A bill of particulars under this section and a bill of discovery under § 1-568.1 et seq. are not inconsistent remedies, and therefore the denial of an application for a bill of particulars does not preclude the same party from thereafter moving for leave to examine the adverse party in regard to the same matters. Tillis v. Calvine Cotton Mills, Inc., 238 N. C. 124, 76 S. E. (2d) 376 (1953).

Applied in Financial Servs. Corp. v. Welborn, 269 N.C. 563, 153 S.E.2d 7 (1967).

§ 1-151. Pleadings construed liberally.

Common-Law Rule, etc.—

The common-law rule that pleadings are to be construed most strongly against the pleader has been abrogated in this State by this section. Patterson v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 266 N.C. 489, 146 S.E.2d 390 (1966).

In Favor of Pleader.—

In accord with 1st paragraph in original. See Clinard v Lambeth, 234 N C. 410 67 S E. (2d) 452 (1951); Hedrick v Graham, 245 N. C. 249, 96 S. E. (2d) 129 (1957); Bailey v. McGill, 247 N. C. 286, 100 S. E. (2d) 860 (1957); Shepard v. Rheem Mfg. Co., 251 N. C. 751, 112 S. E. (2d) 380 (1960); Williams v. Strickland, 251 N C. 767, 112 S. E. (2d) 533 (1960); Moore v. WOOW, Inc., 253 N. C. 1, 116 S. E. (2d) 186 (1960); Jacobs v. State Highway Comm., 254 N. C. 200, 118 S. E. (2d) 416 (1961); McCallum v. Old Republic Life Ins. Co., 259 N. C. 573, 131 S. E. (2d) 435 (1963); Horton v. Redevelopment Comm. of High Point, 259 N. C. 605. 131 S. E. (2d) 464 (1963); Dixon v. Bank of Wash., 265 N.C. 322, 144 S.E.2d 57 (1965); City of Raleigh v. Mercer, 271 N.C. 114, 155 S.E.2d 551 (1967).

In accord with 2nd paragraph in original. See Bumgardner v. Allison Fence Co., 236 N. C. 698, 74 S. E. (2d) 32 (1953); McLaney v. Anchor Motor Freight, Inc., 236 N C. 714. 74 S. E (2d) 36 (1953); Hollifield v. Everhart, 237 N. C. 313. 74 S E (2d) 706 (1953); Lamm v. Crumpler, 240 N. C. 35, 81 S. E. (2d) 138 (1954); Troxler v. Motor Lines, Inc., 240 N. C. 420, 82 S. E. (2d) 342 (1954); Gantt v. Hobson, 240 N C. 426, 82 S. E. (2d) 384 (1954); Belch v Perry, 240 N. C. 764, 84 S. E. (2d) 186 (1954); Lewis v. Lee, 246 N. C. 68, 97 S. E. (2d) 469 (1957); Woody v. Pickelsimer, 248 N. C. 599, 104 S. E. (2d) 273 (1958); Howze v. McCall, 249 N. C. 250, 106 S. E. (2d) 236 (1958); Friday v. Adams, 251 N. C. 540, 111 S. E. (2d) 893 (1960).

The Supreme Court is required on a demurrer to construe the complaint liberally with a view to substantial justice between the parties, and every reasonable intendment is to be made in favor of the pleader. Mebane Lumber Co. v. Avery & Bullock Builders, Inc., 270 N.C. 337, 154 S.E.2d 665 (1967).

In ascertaining whether a pleading upholds a theory, the court construes the allegations of the pleading with liberality in favor of the pleader with a view to presenting the case on its real merits. Cox v. Hennis Freight Lines, Inc., 236 N. C. 72, 72 S. E. (2d) 25 (1952).

Upon examination of a pleading to determine its sufficiency as against a demurrer, its allegations will be liberally construed with a view to substantial justice, and every reasonable intendment and presumption will be given the pleader, and the demurrer overruled unless the pleading is wholly insufficient. Carolina Helicopter Corp. v. Cutter Realty Co., 263 N.C. 139, 139 S.E.2d 362 (1964).

A demurrer admits the truth of factual averments well stated, and such relevant inferences as may be legitimately deduced therefrom. And in passing on the demurrer the Supreme Court is required to construe the amended complaint liberally with a view to substantial justice between the parties and to make every reasonable intendment in favor of the pleader. Little v. Wilson Oil Corp., 249 N. C. 773, 107 S. E. (2d) 729 (1959).

The answer of the appealing defendant must be construed liberally, which means that every reasonable intendment must be taken in favor of him, and if the answer contains well-pleaded facts sufficient to constitute a defense or if it is good in any respect or to any extent, it will not be overthrown by a motion for judgment on the pleadings. Sale v. Johnson, 258 N. C. 749, 129 S. E. (2d) 465 (1963).

With View to Substantial Justice between Parties.—This section requires the court to construe liberally a pleading challenged by a demurrer with a view to substantial justice between the parties. Stamey v. Rutherfordton Electric Membership Corp., 247 N. C. 640, 101 S. E. (2d) 814 (1958).

This section requires that the allegations of a pleading shall be liberally construed for the purpose of determining their effect and with a view to substantial justice between the parties. Edwards v. Edwards, 261 N.C. 445, 135 S.E.2d 18 (1964).

A motion for judgment on the pleadings is not favored by the courts; pleadings alleged to state no cause of action or defense will be liberally construed in favor of the pleader. Edwards v. Edwards, 261 N.C. 445, 135 S.E.2d 18 (1964).

Statement of Cause of Action.—

In accord with 3rd paragraph in original. See Workman v. Workman, 242 N. C. 726, 89 S. E. (2d) 390 (1955).

In accord with 6th paragraph in original. See Guerry v. American Trust Co., 234 N. C. 644, 68 S. E. (2d) 272 (1951); Batchelor v. Mitchell, 238 N. C. 351, 78 S. E. (2d) 240 (1953).

In accord with 9th paragraph in original. See Dillingham v. Kligerman, 235 N. C. 298, 69 S. E. (2d) 500 (1952); Maola Ice Cream Co. v. Maola Ice Cream Co., 238 N. C. 317, 77 S. E. (2d) 910 (1953).

A complaint is not to be overthrown by demurrer, if in any portion or to any extent, it states facts sufficient to constitute a cause of action. Carolina Helicopter Corp. v. Cutter Realty Co., 263 N.C. 139, 139 S.E.2d 362 (1964).

The office of the demurrer is to test the sufficiency of a pleading, admitting for the purpose the truth of factual averments well stated and such relevant inferences of fact as may be deduced therefrom. Lynn v. Clark, 254 N. C. 460, 119 S. E. (2d) 187 (1961).

The office of a demurrer is to test the sufficiency of a pleading, admitting, for the purpose, the truth of factual averments well stated and such relevant inferences as may be deduced therefrom, but it does not admit any legal inferences or conclusions of law asserted by the pleader. Mebane Lumber Co. v. Avery & Bullock Builders, Inc., 270 N.C. 337, 154 S.E.2d 665 (1967).

A pleading challenged by a demurrer is to be construed liberally with a view to substantial justice between the parties. Lynn v. Clark, 254 N. C. 460, 119 S. E. (2d) 187 (1961); Jacobs v. State Highway Comm., 254 N. C. 200, 118 S. E. (2d) 416 (1961); Stegall v. Catawba Oil Co., 260 N.C. 459, 133 S.E.2d 138 (1963).

Extent of Liberal Construction Rule.—Even under the liberal construction of pleadings required by this section, a court cannot construe into a pleading an essential allegation which it does not contain. Calloway v. Wyatt, 246 N. C. 129, 97 S. E. (2d) 881 (1957).

While this section requires that a pleading be construed liberally, the courts are not permitted to read into it facts which it does not contain. Johnson v. Johnson, 259 N. C. 430, 130 S. E. (2d) 876 (1963); High Point Surplus Co. v. Pleasants, 263 N.C. 587, 139 S.E.2d 892 (1965).

A pleading must be fatally defective before it will be rejected as insufficient. Shepard v. Rheem Mfg Co., 251 N. C. 751, 112 S. E. (2d) 380 (1960); Carolina Helicopter Corp. v. Cutter Realty Co., 263 N.C. 139, 139 S.E.2d 362 (1964).

Facts alleged in an answer, although inartfully drawn, are sufficient to withstand a demurrer, if upon a liberal construction thereof the pleading is sufficient to present one or more defenses. Guerry v. American Trust Co., 234 N. C. 644, 68 S. E. (2d) 272 (1951).

Complaint Sustained against Demurrer Ore Tenus. — If, liberally construed, any portion of the complaint with its amendments presents facts sufficient to constitute a cause of action against any defendant, or if facts sufficient for that purpose can be fairly gathered from it, the pleading will be sustained against a joint demurrer ore tenus filed by all the defendants, however inartificially it may have

been drawn, or however uncertain, defective, or redundant may be its statements. The demurrer ore tenus cannot be sustained unless the complaint with its amendments is wholly insufficient as to all defendants. Williams v. Strickland, 251 N. C. 767, 112 S. E. (2d) 533 (1960); Schmidt v. Bryant, 251 N. C. 838, 112 S. E. (2d) 262 (1960).

Protection Afforded by § 1-153.—If an interpretation more favorable to plaintiffs than the allegations warrant is given under this section, defendants can protect themselves by moving for an order requiring the complaint to be made definite and certain under § 1-153. Barbour v. Carteret County, 255 N. C. 177, 120 S. E. (2d) 448 (1961).

Allegations Insufficient for Punitive Damages.—A complaint, construed liberally as required by this section, does not contain allegations of facts or elements sufficient to support an award of punitive damages, where it alleges "that by reason of the premises, there was wanton and willful misconduct for which the defendants, and each one of them, are liable for exemplary and punitive damages." Such allegations are mere conclusions of the pleader with no allegations of facts or elements in the complaint to support such conclusions, and are not a substitute for essential allegations disclosing factual elements justifying an award of punitive damages. Cook v. Lanier, 267 N.C. 166, 147 S.E.2d 910 (1966).

Applied in McKinney v. High Point, 237 N. C. 66, 74 S. E. (2d) 440 (1953); Carolina Power & Light Co. v. Merrimac Mut. Fire Ins. Co., 238 N. C. 679, 79 S. E. (2d) 167 (1953); Boone v. North Carolina R. Co., 240 N. C. 152, 81 S. E. (2d) 380 (1954); Herring v. Volume Merchandise, Inc., 249 N. C. 221, 106 S. E. (2d) 197 (1958); Brooks v. Ervin Constr. Co., 253 N. C. 214, 116 S. E. (2d) 454 (1960); Rowland v. Rowland, 253 N. C. 328, 116 S. E. (2d) 795 (1960); Faircloth v. Ohio Farmers Ins. Co., 253 N. C. 522, 117 S. E. (2d) 404 (1960); Smith v. Moore, 254 N. C. 186, 118 S. E. (2d) 436 (1961); Rhyne v. Bailey, 254 N. C. 467, 119 S. E. (2d) 385 (1961); Davis v. Davis, 256 N. C. 468, 124 S. E. (2d) 130 (1962); Sparks v. Union Trust Co. of Shelby, 256 N. C. 478, 124 S. E. (2d) 365 (1962); Morton v. Thornton, 257 N. C. 259, 125 S. E. (2d) 464 (1962); Nye v. Pure Oil Co., 257 N. C. 477, 126 S. E. (2d) 48 (1962); Cobb v. Clark, 265 N.C. 194, 143 S.E.2d 103 (1965); Michigan Nat'l Bank v. Hanner, 268 N.C. 668, 151 S.E.2d 579 (1966); Franklin Drug Stores, Inc. v. Gur-Sil Corp., 269 N.C. 169, 152 S.E.2d 77 (1967); Coble v. Reap, 269 N.C. 229, 152 S.E.2d 219 (1967); Kidd v. Burton, 269 N.C. 267, 152 S.E.2d 162 (1967); Woodard v. Carteret County, 270 N.C. 55, 153 S.E.2d 809 (1967); Belmany v. Overton, 270 N.C. 400, 154 S.E.2d 538 (1967); Wright v. Fidelity & Cas. Co., 270 N.C. 577, 155 S.E.2d 100 (1967); Childers v. Seay, 270 N.C. 721, 155 S.E.2d 259 (1967).

Quoted in Dennis v. Albemarle, 242 N. C. 263, 87 S. E. (2d) 561 (1955); Weavil v. Myers, 243 N. C. 386, 90 S. E. (2d) 733 (1956); Bailey v. Bailey, 243 N. C. 412, 90 S. E. (2d) 696 (1956); Orkin Exterminating Co. v. O'Hanlon, 243 N. C. 457, 91 S. E. (2d) 222 (1956); Douglas v. W. C. Mallison & Son, 265 N.C. 362, 144 S.E.2d 138 (1965).

Cited in Staunton Military Academy, Inc. v. Dockery, 244 N. C. 427, 94 S. E. (2d) 354 (1956); Rudisill v. Hoyle, 254 N. C. 33, 118 S. E. (2d) 145 (1961); Robbins v. Harrington, 255 N. C. 416, 121 S. E. (2d) 584 (1961).

§ 1-152. Time for pleading enlarged.

Cross References.—

As to extending time for filing exceptions to referee's report, see note to § 1-195.

Inherent Power to Extend Time.—

In accord with original. See Rich v. Norfolk Southern Ry. Co., 244 N. C. 175, 92 S. E. (2d) 768 (1956).

A judge of the superior court in this State has inherent power in his discretion and in furtherance of justice to extend the time for filing a complaint, and he is also vested with such authority by statute. Deanes v. Clark, 261 N.C. 467, 135 S.E.2d 6 (1964).

The right to amend pleadings in a case and allow answers or other pleadings to be filed at any time is an inherent and statutory power of the superior courts which they may exercise at their discretion, unless prohibited by some statutory enactment or unless vested rights are interfered with. State Highway Comm'n v. Hemphill, 269 N.C. 535, 153 S.E.2d 22 (1967).

Review of Discretion.—

In accord with original. See Early v. Eley, 243 N. C. 695, 91 S. E. (2d) 919 (1956); Harmon v. Harmon, 245 N. C. 83, 95 S. E. (2d) 355 (1956).

If the exercise of a discretionary power of the superior court is refused upon the

ground that it has no power to grant a motion addressed to its discretion, the ruling of the court is reviewable. State Highway Comm'n v. Hemphill, 269 N.C. 535, 153 S.E.2d 22 (1967).

A judgment or order rendered by a judge of the superior court in the exercise of a discretionary power is not subjected to review by appeal to the Supreme Court in any event, unless there has been an abuse of discretion on his part. State Highway Comm'n v. Hemphill, 269 N.C. 535, 153 S.E.2d 22 (1967).

Section 136-107 Prohibits Exercise of Discretion in Condemnation Cases. — Section 136-107 expresses a definite, sensible, and mandatory meaning concerning procedure in condemnation proceedings under chapter 136, so as to prohibit the exercise of the statutory or inherent power by the superior court to allow extension of time to answer after time allowed by § 136-107 has expired. State Highway Comm'n v. Hemphill, 269 N.C. 535, 153 S.E.2d 22 (1967).

This section has been held applicable to complaints. Deanes v. Clark, 261 N.C. 467, 135 S.E.2d 6 (1964).

Where an amended complaint is filed after expiration of the time allowed in the order permitting the filing of the amendment, the trial court has the discretionary power to enter an order extending the time for the filing of the amendment to the date of the hearing and overrule defendant's motion to strike on the ground that the amendment was filed after the expiration of the time allowed. Alexander v. Brown, 236 N. C. 212, 72 S. E. (2d) 522 (1952).

Defendants were not entitled to dismissal as a matter of right for plaintiff's failure to file complaint in due time, since this section authorizes the judge, in his discretion, to enlarge time for pleading. Early v. Eley, 243 N. C. 695, 91 S. E. (2d) 919 (1956).

Enlarging Time for Filing Answer.— In accord with original. See Harmon v. Harmon, 245 N. C. 83, 95 S. E. (2d) 355 (1956).

When the complaint states a cause of action, the court, in the exercise of its discretion, may extend defendant's time to plead. Walker v. Nicholson, 257 N. C. 744, 127 S. E. (2d) 564 (1962).

Section 136-107 limiting the time for the filing of answer in condemnation proceedings instituted by the Highway Commission must be construed as an exception to the general power of the court to extend the time for the filing of pleadings, so that the court has no discretionary power to allow the filing of an answer after the time limited in the condemnation statute. State Highway Comm'n v. Hemphill, 269 N.C. 535, 153 S.E.2d 22 (1967).

Motion to Strike.—When a motion to strike is not made in apt time, the court has discretionary power to allow or deny such motion, and its ruling will not be disturbed on appeal in the absence of an abuse of discretion. McDaniel v. Fordham, 264 N.C. 62, 140 S.E.2d 736 (1965).

§ 1-153. **Irrelevant, redundant, indefinite pleadings.**—If irrelevant or redundant matter is inserted in a pleading, it may be stricken out on motion of any person aggrieved thereby, but this motion must be made before answer or demurrer, or before an extension of time to plead is granted. When the allegations of a pleading are so indefinite or uncertain that the precise nature of the charge or defense is not apparent, the court may require the pleading to be made definite and certain by amendment. Any such motion to strike any matter out of any pleading may, upon ten days' notice to the adverse party, be heard out of term in any county of the district by the resident judge of the district or by any judge regularly assigned to hold the courts of the district. (C. C. P., s. 120; Code, s. 261; Rev., s. 496; C. S., s. 537; 1949, c. 146; 1961, c. 455.)

Editor's Note.—

The 1961 amendment inserted the words "in any county of the district" in line nine.

For comment on the jurisdiction of the clerk of the superior court to rule on a motion to strike pleadings, see 34 N. C. Law Rev. 19.

Section Affords Protection against § 1-151.—If an interpretation more favorable to plaintiffs than the allegations warrant is given under § 1-151, defendants can protect themselves by moving for an order requiring the complaint to be made definite and certain under this section. Barbour v. Carteret County, 255 N. C. 177, 120 S. E. (2d) 448 (1961).

The benefits of this section may be claimed as a matter of right, rather than of grace. Daniel v. Gardner, 240 N. C. 249, 81 S. E. (2d) 660 (1954); Lutz Industries, Inc. v. Dixie Home Stores, 242 N. C. 332, 88 S. E. (2d) 333 (1955); McDaniel v. Fordham, 264 N.C. 62, 140 S.E.2d 736 (1965).

Power to Strike.—

In accord with original. See Wall v. England, 243 N. C. 36, 89 S. E. (2d) 785 (1955).

Discretion of Court.—

Motions to strike which are made in apt time are made as a matter of right, and are not addressed to the discretion of the court. Baker v. Fruehauf Trailer Co., 242 N. C. 724, 89 S. E. (2d) 388 (1955); Hayes v. Wilmington, 243 N. C. 548, 91 S. E. (2d) 690 (1956).

A complaint should not contain collateral, irrelevant, redundant or evidentiary matters in respect to the relationship of the parties and the legal duty or duties upon which the plaintiff grounds his cause of action. Pinnix v. Toomey, 242 N. C. 358, 87 S. E. (2d) 893 (1955).

A complaint should not contain irrelevant or evidentiary matter. Toone v. Adams, 262 N.C. 403, 137 S.E.2d 132 (1964).

Allegations not material to a decision in connection with the relief sought should be stricken. Fuchs v. Fuchs, 260 N.C. 635, 133 S.E.2d 487 (1963).

Allegation Repeating Matter Expressly or Impliedly Alleged.—There is no prejudicial error in striking from a pleading an allegation which merely repeats or restates that which is expressly alleged, or necessarily implied, in other portions of the pleading not stricken. R. H. Bouligny, Inc. v. United Steelworkers of America, AFL-CIO, 270 N.C. 160, 154 S.E.2d 344 (1967).

Rule Applies to Reply.—The rule which prohibits the incorporation of extraneous, evidential, irrelevant, impertinent, or scandalous matter in a complaint or answer applies with equal force to a reply This is particularly true if such matter may well tend to prejudice defendant when read to the jury Spain v. Brown, 236 N. C. 355, 72 S. E (2d) 918 (1952).

Demurrer and Motion to Strike Distinguished.—The right of the defendant to strike portions of a complaint which are insufficient to state a cause of action attempted to be set up is upheld upon the view that such allegations are in fact "irrelevant." If the complaint be wholly insufficient to state a cause of action, objection should be raised by demurrer; but when only a portion of the pleading or certain paragraphs are insufficient for the purpose for which they are inserted, relief may properly be had by motion to strike the objectionable paragraphs. Miller v. First Nat Bank, 234 N. C. 309, 67 S. E. (2d) 362 (1951)

When Motion to Strike Deemed Demurrer.—A motion to strike a pleading in its entirety and dismiss the action was in substance, if not in form, a demurrer to the pleading, and was so considered. Johnson v Johnson, 259 N. C. 430, 130 S. E. (2d) 876 (1963).

Ruling Not Disturbed on Appeal Unless Appellant Prejudiced.—The denying or granting of a motion to strike allegations from a pleading under the provisions of this section will not be disturbed on appeal unless it is made to appear that appellant was prejudiced thereby. Gallimore v. State Highway, etc., Comm., 241 N. C. 350, 85 S. E. (2d) 392 (1955).

Quaere as to Jurisdiction of Clerk.—Gallimore v. State Highway, etc., Comm., 241 N. C. 350, 85 S. E. (2d) 392 (1955).

If allegations in a pleading are relevant upon any admissible theory, they ought not to be stricken out on motion. Garrett v. Rose, 236 N. C. 299, 72 S. E. (2d) 843 (1952).

When Matter Irrelevant.—Matter in a pleading is irrelevant within the purview of this section if it has no substantial relation to the controversy between the parties in the particular action. Council v. Dickerson's, Inc., 233 N. C 472, 64 S. E. (2d) 551 (1951); Atlantic Coast Line R.R. v. State Highway Comm'n, 268 N.C. 92, 150 S.E.2d 70 (1966); R. H. Bouligny, Inc. v. United Steelworkers of America, AFL-CIO, 270 N.C. 160, 154 S.E.2d 344 (1967).

Nothing should remain in a pleading over objection which is incompetent to be shown in evidence. Daniel v. Gardner, 240 N C. 249, 81 S. E. (2d) 660 (1954); Carpenter v. Carpenter, 244 N. C. 286, 93 S. E. (2d) 617 (1956); Eastern Steel Products Corp. v. Chestnutt, 252 N. C. 269, 113 S. E. (2d) 587 (1960); Durham Bank & Trust Co. v. Pollard, 256 N.C. 77, 123 S.E.2d 104 (1961).

On motion to strike, the test of a relevancy is the right of the pleader to present in evidence upon the trial the facts to which the allegations relate. Daniel v. Gardner, 240 N. C. 249, 81 S. E. (2d) 660 (1954); Lutz Industries, Inc. v. Dixie Home Stores, 242 N. C. 332, 88 S. E. (2d) 333 (1955); Batts v. Batts, 248 N. C. 243, 102 S E. (2d) 862 (1958).

In an action for personal injury, allegations in the cross action of one defendant against another defendant to the effect that such other defendant was required under the contract for the work out of which the injury arose to furnish faithful performance bond and take out and maintain liability and property damage insurance, are irrelevant and are properly stricken on motion aptly made even

though the surety company, later joined as a party, fails to move that such allegations be stricken. Hayes v. Wilmington, 243 N. C. 548, 91 S. E. (2d) 690 (1956).

Upon a motion for an increase in the allowance for support of the children of the marriage, the wife's allegation attacking the subsequent marriage of the husband on the ground that the divorce of the second wife was invalid, and that the husband was not under legal obligation to support the second wife and her minor child, was irrelevant and should have been stricken on motion. Fuchs v. Fuchs, 260 N.C. 635, 133 S.E.2d 487 (1963).

Test of Relevancy Is Right to Present Facts in Evidence.—On motion to strike, the test of relevancy is the right of the pleader to present in evidence upon the trial the facts to which the allegations relate. Durham Bank & Trust Co. v. Pollard, 256 N. C. 77, 123 S. E. (2d) 104 (1961).

The test of relevancy of allegations sought to be stricken from an answer is whether such allegations, either in themselves or in connection with other averments, tend to state a defense or a counterclaim. If they do, they are not irrelevant, and ought not to be expunged. Garrett v. Rose, 236 N. C. 299, 72 S. E. (2d) 843 (1952); R. H. Bouligny, Inc. v. United Steelworkers of America, AFL-CIO, 270 N.C. 160, 154 S.E.2d 344 (1967).

Irrelevant and Redundant Allegations Distinguished.—Allegations which set forth matters foreign and immaterial to the controversy are considered irrelevant, whereas excessive fullness of detail or the repetition of facts are treated as being redundant. Daniel v. Gardner, 240 N. C. 249, 81 S. E. (2d) 660 (1954); Durham Bank & Trust Co. v. Pollard, 256 N. C. 77, 123 S. E. (2d) 104 (1961).

Allegations which are wholly evidential and probative have no place in stating a cause of action and should be stricken out. Nevertheless, allegations in a complaint should be stricken only when they are clearly improper, irrelevant, or unduly repetitious. Daniel v. Gardner, 240 N. C. 249, 81 S. E. (2d) 660 (1954).

The function of a pleading is not the narration of the evidence, but rather the statement of the substantive, ultimate facts upon which the right to relief is founded. Durham Bank & Trust Co. v. Pollard, 256 N. C. 77, 123 S. E. (2d) 104 (1961).

When the challenged allegations relate solely to questions of fact addressed to the court, the legislative intent expressed in this section has no application. **Collier** v. Mills, 245 N. C. 200, 95 S. E. (2d) 529 (1956).

A motion to strike under this section should be directed to specific allegations. Jewell v. Price, 259 N. C. 345, 130 S. E. (2d) 668 (1963).

Time of Motion.—

In accord with 1st paragraph in original. See Bolin v. Bolin, 242 N. C. 642, 89 S. E. (2d) 303 (1955).

In accord with 2nd paragraph in original. See Tucker v. Transou, 242 N. C. 498, 88 S. E. (2d) 131 (1955).

Power to Allow Motion Not Made in Apt Time.—When a motion to strike is not made in apt time, the court has discretionary power to allow or deny such motion, and its ruling will not be disturbed on appeal in the absence of an abuse of discretion. McDaniel v. Fordham, 264 N.C. 62, 140 S.E.2d 736 (1965).

Defendant Not Required to Answer Until Motion to Strike Is Passed on.—If the motion to strike is timely filed, or if allowed to be filed as a matter of discretion, the defendant is not required to answer until the motion is passed on by the judge. McDaniel v. Fordham, 264 N.C. 62, 140 S.E.2d 736 (1965).

When Denial of Motion to Strike Matter from Pleading Ground for Reversal.—

In accord with original. See Ledford v. Marion Transportation Co., 237 N. C. 317, 74 S. E. (2d) 653 (1953); Sowers v. Home-Made Chair Co., 238 N. C. 576, 78 S. E. (2d) 342 (1953); Daniel v. Gardner, 240 N. C. 249, 81 S. E. (2d) 660 (1954); Lutz Industries, Inc. v. Dixie Home Stores, 242 N. C. 332, 88 S. E. (2d) 333 (1955); Baker v. Fruehauf Trailer Co., 242 N. C. 724, 89 S. E. (2d) 388 (1955); Batts v. Batts, 248 N. C. 243, 102 S. E. (2d) 862 (1958); Durham Bank & Trust Co. v. Pollard, 256 N. C. 77, 123 S. E. (2d) 104 (1961).

To invoke the aid of the Supreme Court under this section, it is not enough to show error and no more; the burden is on the appellant to show error which is material and prejudicial. Daniel v. Gardner, 240 N. C. 249, 81 S. E. (2d) 660 (1954).

Order May Not Be Made After Judgment.—An order under this section is to enable the movant to prepare his defense and may not be made after judgment. Morton v. Blue Ridge Ins. Co., 255 N. C. 360, 121 S. E. (2d) 716 (1961).

Applied in Sprinkle v. Ponder, 233 N. C. 312, 64 S. E. (2d) 171 (1951); Purvis v. Whitaker, 238 N. C. 262, 77 S. E. (2d) 682 (1953); Neal v. Marrone, 239 N. C. 73, 79 S. E. (2d) 239 (1953); Davis Co. v.

Burnsville Hosiery Mills, 242 N. C. 718, 89 S. E. (2d) 410 (1955); East Carolina Lumber Co. v. Pamlico County, 250 N. C. 681, 110 S. E. (2d) 278 (1959); Potts v. Howser, 267 N.C. 484, 148 S.E.2d 836 (1966); Financial Servs. Corp. v. Welborn, 269 N.C. 563, 153 S.E.2d 7 (1967).

Quoted in Adams v. Beshears, 262 N.C. 740, 138 S.E.2d 407 (1964).

Cited in Reliable Trucking Co. v. Payne, 233 N. C. 637, 65 S. E. (2d) 132 (1951); Williams v. Union County Hospital Ass'n, 234 N. C. 536, 67 S. E. (2d) 662 (1951); Neal v. Atlantic Greyhound Corp., 235 N. C. 225, 69 S. E. (2d) 319 (1952); Midkiff v. National Ass'n for Stock Car Auto Racing, Inc., 240 N. C. 470, 82 S. E. (2d) 417 (1954); Auto Finance Co. v. Simmons, 247 N. C. 724, 102 S. E. (2d) 119 (1958); Brewer v. Carolina Coach Co., 253 N. C. 257, 116 S. E. (2d) 725 (1960); Bryant v. Occidental Life Ins. Co., 253 N. C. 565, 117 S. E. (2d) 435 (1960); Clement v. Koch, 259 N. C. 122, 130 S. E. (2d) 65 (1963).

§ 1-157. How private statutes pleaded.

Introduction of Unpleaded Private Acts Not Prejudicial.—The introduction in evidence of two private acts which had not been pleaded, but which refer to two other private acts properly pleaded and introduced in evidence, was not held prejudicial error when it appeared that the adverse parties were not taken by surprise by the introduction of the unpleaded acts and that the failure to plead them was not material. Hall v. Fayetteville, 248 N. C. 474, 103 S. E. (2d) 815 (1958).

Applied in Jamison v. Charlotte, 239 N. C. 423, 79 S. E. (2d) 797 (1954).

§ 1-159. Allegations not denied, deemed true.

Origin of Section.—This statute was patterned on § 243 of the New York Civil Practice Act. Wescott v. State Highway Comm'n, 262 N.C. 522, 138 S.E.2d 133 (1964).

Silence of Defendant Is Confession of Liability. — When the statutory requirements as to the complaint, its service, etc., have been complied with a defendant is called to make some response. If he remains silent and files no answer, it is by law a confession of liability on the cause of action asserted in the complaint, under this section, and an assent to the ascertainment of the extent of that liability in the manner prescribed by law. Pruitt v. Taylor, 247 N. C. 380, 100 S. E. (2d) 841 (1957).

Admission Establishes Predicate Facts of Issue.—The admission in the answer of the truth of the predicate facts of an issue establishes such facts. Carver v. Lykes, 262 N.C. 345, 137 S.E.2d 139 (1964).

When Allegations in Answer Deemed Controverted without Reply.—An allegation in an answer is deemed controverted without necessity of reply if it does not relate to a counterclaim. Creech v. Creech, 256 N. C. 356, 123 S. E. (2d) 793 (1962).

Where plaintiff did not reply and expressly deny defendant's allegations of adultery, but these allegations did not relate to a counterclaim, they were taken as controverted. Creech v. Creech, 256 N. C. 356, 123 S. E. (2d) 793 (1962).

New matter alleged in the answer is deemed controverted without the necessity of a reply. Wescott v. State Highway Comm'n, 262 N.C. 522, 138 S.E.2d 133 (1964).

New Matter Constituting Counterclaim. —When an answer contains new matter constituting a counterclaim, such new matter is to be taken as true for the purposes of the action unless it is actually controverted by the reply of the plaintiff as required by this section, or unless it is deemed to be denied by the plaintiff as a matter of law without a formal reply on account of the neglect of the defendant to cause the answer to be served upon the plaintiff or his counsel of record as provided by § 1-140. Wells v. Clayton, 236 N. C. 102, 72 S. E. (2d) 16 (1952).

New Matter Not Amounting to Counterclaim. —

In accord with 3rd paragraph in original. See Wilson v. Chandler, 235 N. C. 373, 70 S. E. (2d) 179 (1952).

Allegations of the answer not amounting to a counterclaim are deemed denied without the necessity of a reply. Nebel v. Nebel, 241 N. C. 491, 85 S. E. (2d) 876 (1955).

New matter alleged in the answer, provided it does not amount to a counterclaim, is deemed controverted without the necessity of a reply under this section, and therefore plaintiff may offer evidence avoiding a plea in bar set up in the answer without the necessity of alleging the facts by way of reply. Gamble v. Stutts, 262 N.C. 276, 136 S.E.2d 688 (1964).

Allegations in Pleading Are Conclusive against Pleader.—In searching the plead-

ings to determine the material facts which are controverted and those which are taken as true, the rule is that each party is bound by his pleading, and unless withdrawn, amended, or otherwise altered, the allegations contained in a pleading ordinarily are conclusive as against the pleader. Universal C. I. T. Credit Corp. v. Saunders, 235 N. C. 369, 70 S. E. (2d) 176 (1952).

Applied in Clapp v. Clapp, 241 N. C. 281, 85 S. E. (2d) 153 (1954); Rowe v. Murphy, 250 N. C. 627, 109 S. E. (2d) 474 (1959).

Article 18.

Amendments.

§ 1-161. Amendment as of course.

The right to amend a complaint is conferred by statute. In one instance, under this section, the plaintiff can exercise that right without permission of the court. He must do so before the time for answering has expired. If he does not amend before the time to answer expires, he may amend upon application to and permission of the court under § 1-163. Pruitt v. Taylor, 247 N. C. 380, 100 S. E. (2d) 841 (1957).

Time of Amendment, etc.—

After the time allowed for answering a pleading has expired, such pleading may not be amended as a matter of right, but only in the discretion of the court. Consolidated Vending Co. v. Turner, 267 N.C. 576, 148 S.E. 531 (1966).

The plaintiff not having amended his complaint within five days after the day on which the demurrer was filed, on which date his attorneys accepted service of a copy of the written demurrer, the defendant had the right to have the demurrer ruled upon after the lapse of five days therefrom; and therefore, the ruling of the court in declining to continue the hearing on the demurrers as requested by the plaintiff, to allow him to amend, was upheld without prejudice to the right of the plaintiff to apply for leave to amend, as provided in § 1-131. Upchurch v. Raleigh, 252 N. C. 676, 114 S. E. (2d) 722 (1960).

Review of Ruling Denying Motion. — Where a motion to amend is denied in the discretion of the trial judge, his ruling is not reviewable in the absence of a clear showing of abuse of discretion. Consolidated Vending Co. v. Turner, 267 N.C. 576, 148 S.E.2d 531 (1966).

Cited in Burrell v. Dickson Transfer Co., 244 N. C. 662, 94 S. E. (2d) 829 (1956); Roberts v. Coca-Cola Bottling Co. of Asheville, 256 N. C. 434, 124 S. E. (2d) 105 (1962); Strickland v. Jackson, 260 N.C. 190, 132 S.E.2d 338 (1963).

§ 1-163. Amendments in discretion of court.

I. IN GENERAL.

Cross Reference.—

See note to § 1-161.

The court in its discretion may, before or after judgment, amend any pleading by inserting other allegations material to the case, or, when the amendment does not change substantially the claim, by conforming the pleading or proceeding to the facts. Bassinov v. Finkle, 261 N.C. 109, 134 S.E.2d 130 (1964).

Power to Amend Independent of Statute.—

In accord with original. See Wheeler v. Wheeler, 239 N. C. 646, 80 S. E. (2d) 755 (1954).

Even without this section, the superior court possesses an inherent discretionary power to amend pleadings at any time, and amendments should be liberally allowed. Gilliam Furniture, Inc. v. Bentwood, Inc., 267 N.C. 119, 147 S.E.2d 612 (1966).

Power Is Broader as to Amendments Proposed before Trial. — An analysis of this section lends support to the view that the scope of the court's power to allow amendments is broader when dealing with amendments proposed before trial than during or after trial. Modern Electric Co., Inc. v. Dennis, 255 N. C. 64, 120 S. E. (2d) 533 (1961); Geo. A. Hormel & Co. v. City of Winston-Salem, 263 N.C. 666, 140 S.E.2d 362 (1965).

Extension of Time for Filing Amendment.—Where an amended complaint is filed after expiration of the time allowed in the order permitting the filing of the amendment, the trial court has the discretionary power to enter an order extending the time for the filing of the amendment to the date of the hearing and overrule defendant's motion to strike on the ground that the amendment was filed after the expiration of the time allowed. Alexander v.

Brown, 236 N. C. 212, 72 S. E. (2d) 522 (1952).

Applied in Brown v. Guaranty Estates Corp., 239 N. C. 595, 80 S. E. (2d) 645 (1954); Reynolds v. Earley, 241 N. C. 521, 85 S. E. (2d) 904 (1955); Burchette v. Davis Distributing Co., 243 N. C. 120, 90 S. E. (2d) 232 (1955); Casstevens v. Wilkes Telephone Membership Corp., 254 N. C. 746, 120 S. E. (2d) 94 (1961); Hunnicutt v. Shelby Mut. Ins. Co., 255 N. C. 515, 122 S. E. (2d) 74 (1961).

Cited in Universal C. I. T. Credit Corp. v. Saunders, 235 N. C. 369, 70 S. E. (2d) 176 (1952); Jackson v. Baggett, 237 N. C. 554, 75 S. E. (2d) 532 (1953); Burrell v. Dickson Transfer Co., 244 N. C. 662, 94 S. E. (2d) 829 (1956); Stathopoulos v. Shook, 251 N. C. 33, 110 S. E. (2d) 452 (1959); Smith v. Moore, 254 N. C. 186, 118 S. E. (2d) 436 (1961); Nix v. English, 254 N. C. 414, 119 S. E. (2d) 220 (1961); Roberts v. Coca-Cola Bottling Co. of Asheville, 256 N. C. 434, 124 S. E. (2d) 105 (1962); Milwaukee Ins. Co. v. McLean Trucking Co., 256 N. C. 721, 125 S. E. (2d) 25 (1962); Widenhouse v. Yow, 258 N. C. 599, 129 S. E. (2d) 306 (1963); Kleibor v. Rogers, 265 N.C. 304, 144 S.E.2d 27 (1965).

II. DISCRETIONARY POWERS OF THE COURT.

Powers Discretionary — When Reviewable.—

The lower court may allow or disallow such amendments as it may think proper in the exercise of sound discretion, bearing in mind, of course, that the nature of the cause of action as previously chartered may not be substantially changed. Goldston Bros. v. Newkirk, 234 N.C. 279, 67 S. E. (2d) 69 (1951)

Whether the trial court should allow an amendment to the pleadings rests in the court's sound discretion, and the court's ruling thereon is not reviewable on appeal. Sawyer v. Cowell, 241 N. C. 681, 86 S. E. (2d) 431 (1955).

This section vests in the judge broad discretionary powers to permit amendments to any pleading, process or proceeding either before or after judgment. Geo. A. Hormel & Co. v. City of Winston-Salem, 263 N.C. 666, 140 S.E.2d 362 (1965).

An order allowing plaintiff to file an amended complaint and defendant time thereafter to answer is made in the court's discretion, and as such is not reviewable in the absence of manifest abuse. Williams v. Denning, 260 N.C. 539, 133 S.E.2d 150 (1963).

The motion to amend was addressed to the discretion of the court and the court's decision thereon was not subject to review, there being no showing or contention that the court abused its discretion. Perfecting Serv. Co. v. Product Dev. & Sales Co., 264 N.C. 79, 140 S.E.2d 763 (1965).

This section vests in the presiding judge almost unlimited authority to permit amendments either before or after judgment. Dobias v. White, 240 N. C. 680, 83 S. E. (2d) 785 (1954); Casstevens v. Wilkes Telephone Membership Corp., 254 N. C. 746, 120 S. E. (2d) 94 (1961).

Not Reviewable Except for Palpable Abuse.—

The discretionary denial by the trial court of a motion to amend the pleadings and process is not reviewable in the absence of manifest abuse of discretion. Crump v. Eckerd's, Inc., 241 N. C. 489, 85 S. E. (2d) 607 (1955).

Each Case Decided on Its Facts.—The powers of amendment conferred by this section are by its very terms left to be exercised in the discretion of the court. Therefore, no inflexible rule applicable to all cases can be laid down. Necessarily, each case must to some extent be decided upon its particular facts. Gilliam Furniture, Inc. v. Bentwood, Inc., 267 N.C. 119, 147 S.E.2d 612 (1966).

III. INTRODUCING NEW CAUSE OF ACTION, DEFENSE OR RELIEF.

Permissible When It Introduces No New Cause.—

In accord with 1st paragraph in original. See Wheeler v. Wheeler, 239 N. C. 646, 80 S. E. (2d) 755 (1954).

A trial court may permit a pleading to be amended at any time unless the amendment in effect modifies or changes the cause of action and deprives defendant of a fair opportunity to assemble and present his evidence relative to the matters asserted in the amendment. Thompson v. Seaboard Air Line Co., 248 N. C. 577, 104 S. E. (2d) 181 (1958).

The right to amend pleadings does not permit the litigant to set up a wholly different cause of action or change substantially the form of the action originally sued upon. Anderson v. Atkinson, 235 N. C. 300, 69 S. E. (2d) 603 (1952).

The court may not permit a litigant to set up by amendment a wholly different cause of action or an inconsistent cause. Bassinov v. Finkle, 261 N.C. 109, 134 S.E.2d 130 (1964).

Amendment Which Only Adds to Original Cause May Be Allowed.—The allowance of an amendment which only adds to the original cause of action is not such substantial change as to amount to an abuse of discretion. Bassinov v. Finkle, 261 N.C. 109, 134 S.E.2d 130 (1964); Gilliam Furniture, Inc. v. Bentwood, Inc., 267 N.C. 119, 147 S.E.2d 612 (1966).

When Amendment Introducing New Cause May Be Allowed.—Where no statute of limitations is involved, it is permissible to allow a plaintiff to introduce a new cause of action by way of amendment for damages for detention of property, possession of which was sought by the action as begun, if the facts constituting the new cause of action arise out of or are connected with the transactions upon which the original complaint is based. Mica Industries, Inc. v. Penland, 249 N. C. 602, 107 S. E. (2d) 120 (1959).

Where plaintiff, in amendments to her complaint, for the first time stated facts sufficient to constitute a cause of action, the cause of action then stated embraced relevant facts connected with the transactions forming the subject of her prior pleadings. Hence, absent the bar of an applicable statute of limitations, such new cause of action may be introduced by way of amendment of plaintiff's prior pleadings. Stamey v. Rutherfordton Electric Membership Corp., 249 N. C. 90, 105 S. E. (2d) 282 (1958).

It is permissible under this section to allow plaintiff to introduce a new cause of action by way of amendment if the facts constituting the new cause of action arise out of or are connected with the transactions upon which the original complaint is based. Gilliam Furniture, Inc. v. Bentwood, Inc., 267 N.C. 119, 147 S.E.2d 612 (1966).

Amendment Not Permitted Five Days Before Appeal Is to Be Heard.—Where a proposed amendment sets up a wholly different cause of action, or changes substantially the action originally sued upon, this section does not permit this to be done five days before an appeal is to be heard in the Supreme Court. Geo. A. Hormel & Co. v. City of Winston-Salem, 263 N.C. 666, 140 S.E.2d 362 (1965).

IV. CONFORMING PLEADINGS TO FACTS FOUND.

Amendment Permissible. — An amendment to a complaint which makes the pleading conform to the evidence, and does not change the claim of the plaintiff is permissible under this section. Chaffin v. Brame, 233 N. C. 377, 64 S. E. (2d) 276 (1951).

Motion Made after Verdict.—Where a motion for leave to amend a complaint to conform to the facts established by the verdict was not made until after the verdict, it was not error to grant it, since the trial below was conducted as if the amendment had been made and the amendment did not change substantially the plaintiff's claim. Litaker v. Bost, 247 N. C. 298, 101 S. E. (2d) 31 (1957).

V. AMENDMENTS OF PROCESS.

Generally. —

When the summons bears the seal of the clerk and there is evidence it actually emanated from the clerk's office, or the jurat of the clerk and his signature appears below the cost bond, the paper bears internal evidence of its official character and the defect may be cured by amendment When it does not bear some such evidence, it is void and not subject to amendment. Boone v. Sparrow, 235 N. C. 396, 70 S. E. (2d) 204 (1952)

Absence of Clerk's Signature.—

If the summons bears internal evidence of its official origin and of the purpose for which it was issued, it comes within the definition of original process and may be amended by permitting the clerk to sign nunc pro tunc as provided by this section. This rule is subject to the limitation that such alteration of the record must not disturb or impair any intervening rights of third parties. Boone v. Sparrow, 235 N. C 396, 70 S. E. (2d) 204 (1952)

If there is nothing upon the face of the paper which stamps upon it unmistakably an official character, it is not a defective summons but no summons at all — "no more than one of the usual printed blanks kept by the clerks of the courts." The curative power of amendment may not be invoked when there is nothing upon the face of the paper to give assurance that it received the sanction of the clerk before it was delivered to the sherriff to be served. Boone v. Sparrow, 235 N. C. 396, 70 S. E. (2d) 204 (1952).

VI. AMENDMENTS AS TO PARTIES.

Generally.—

It is ordinarily within the discretion of the trial judge to make additional parties. Shelby v. Lackey, 235 N. C. 343, 69 S E (2d) 607 (1952).

Correcting Misnomer or Mistake, etc.—

In accord with 1st paragraph in original. See Graves v. Welborn, 260 N.C. 688, 133 S.E.2d 761 (1963).

Plaintiff Allowed to Amend to Designate Herself as Administratrix.—The court has plenary power under this section to permit plaintiff, who in fact was duly appointed administratrix at the time a complaint was filed, to amend the caption in the complaint in order to designate herself as administratrix in conformity with the allegation in the complaint. Graves v. Welborn, 260 N.C. 688, 133 S.E.2d 761 (1963).

Bringing in Insurance Company Which Has Paid Part of Plaintiff's Loss. — An insurance company which pays the insured for a part of the loss is entitled to share to the extent of its payment in the proceeds of the judgment in the action brought by the insured against the tort-feasor to recover the total amount of the loss, and may be brought into the action by the court in the exercise of its discretionary power to make new parties at the instance of the insured or the tort-feasor either in the capacity of an additional plaintiff or in the capacity of an additional defendant. Burgess v. Trevathan, 236 N. C. 157, 72 S. E. (2d) 231 (1952), commented on in 31 N. C. Law Rev. 224.

Substituting Another Corporation for Original Plaintiff. — In an action for an injunction by plaintiff corporation arising out of a contract entered into between another corporation and the defendant, the trial court did not have the power to substitute the other corporation as plaintiff in lieu of the original plaintiff. Orkin Exterminating Co. v. O'Hanlon, 243 N. C. 457, 91 S. E. (2d) 222 (1956).

VIII. SPECIFIC INSTANCES.

Amending Complaint under Wrongful Death Statute So as to Bring Action within Federal Employers' Liability Act. — Where the complaint alleges damages for wrongful death under State statute, but the evidence shows that the deceased was an employee of a railroad company and was fatally injured while engaged in the discharge of his duties in interstate commerce, the court plainly has power under this section to allow plaintiff to amend so as to allege that the parties were engaged in interstate commerce and that plaintiff was the sole dependent of the deceased, so as to bring the action within the Federal Employers' Liability Act; and this notwithstanding such amendment was allowed more than three years after the death of decedent. Graham v. Atlantic Coast Line R. Co., 240 N. C. 338, 82 S. E. (2d) 346 (1954).

Amendment Alleging Failure of Defendant to Keep Proper Lookout.—Where the facts alleged in a complaint were sufficient to imply by a fair and reasonable intendment that defendant failed to keep a proper lookout, the court had the discretionary power even after judgment to permit plaintiff to amend to allege specifically such failure. Moreover, the court had the authority to allow such amendment even if the original complaint did not allege by necessary implication defendant's failure to keep a proper lookout. Simrel v. Meeler, 238 N. C. 668, 78 S. E. (2d) 766 (1953).

Amendment as to Identity of Driver of Automobile.—In an action involving negligent operation of an automobile resulting in death, it was not error to allow, upon motion made after verdict, an amendment to conform the complaint to the finding of the jury as to the identity of the driver of the automobile, where the crucial fact in respect to defendant's liability was not the identity of the driver, but that defendant, the owner of the automobile, permitted or directed its operation. Litaker v. Bost, 247 N. C. 298, 101 S. E. (2d) 31 (1957).

§ 1-165. Unsubstantial defects disregarded.

Applied in Litaker v. Bost, 247 N. C. 298, 101 S. E. (2d) 31 (1957).

§ 1-167. Supplemental pleadings.

This section was enacted to meet the specific situations herein recited and to provide a method for obtaining leave to amend a pleading out of a term and in the absence of a judge. Dobias v. White, 240 N. C. 680, 83 S. E. (2d) 785 (1954).

§ 1-168. Variance, material and immaterial.

Editor's Note.—

For note on material and immaterial variance, see 41 N. C. Law Rev. 647.

Variance Not Objected to and Party Not Misled.—Where a motion for leave to amend a complaint to conform to the facts established by the verdict was not made until after the verdict, it was not error to have granted it, since variance prior to amendment had not been objected to and

did not mislead appellant to his prejudice. Litaker v. Bost, 247 N. C. 298, 101 S. E. (2d) 31 (1957).

Judgment of nonsuit is proper when there is a fatal variance between a plaintiff's allegata and probata. Whether the variance is to be deemed material (fatal) under this section must be resolved in the light of the facts of each case. Spaugh v. Winston-Salem, 249 N. C. 194, 105 S. E. (2d) 610 (1958).

Materiality of Variance Depends on Facts of Case.—Whether the variance is material so as to justify nonsuit must be resolved in the light of the facts of each case. McCrillis v. A & W Enterprises, Inc., 270 N.C. 637, 155 S.E.2d 281 (1967).

Variance Immaterial unless Party Misled.—

Where the variation between allegation and proof is such that the adverse party could not have been misled thereby to his prejudice, it will not be deemed a material variance. McCrillis v. A & W Enterprises, Inc., 270 N.C. 637, 155 S.E.2d 281 (1967).

Examples of Immaterial Variances.—

Contention that the trial court erroneously submitted to the jury a theory of liability unsupported by appropriate allegation could not be sustained where there was no showing of surprise or prejudice, as such variance if any was immaterial. Dennis v. Albemarle, 242 N. C. 263, 87 S. E. (2d) 561 (1955).

Where it does not appear that the plaintiff was misled to his prejudice by the variance between the defendant's pleading and proof, the variance will be treated as immaterial and insufficient to support the judgment of nonsuit entered below. Zager v. Setzer, 242 N. C. 493, 88 S. E. (2d) 94 (1955).

Whether at the time of impact the plaintiff was pedaling his bicycle, had stopped it to pick up his shoe, was on the right, or on the extreme right of the road, or whether he was at or near the center, are matters of mere detail insufficient to constitute a fatal variance. Wilson v. Bright, 255 N. C. 329, 121 S. E. (2d) 601 (1961).

Variance between the allegation in the complaint that a contract of employment was for a period of six years and the evidence of a contract for five years, later modified by mutual consent so as to begin one year later was not a material variance. McCrillis v. A & W Enterprises, Inc., 270 N.C. 637, 155 S.E.2d 281 (1967).

Variance Held Immaterial.—See Bunton v. Radford, 265 N.C. 336, 144 S.E.2d 52 (1965); Lewis v. Barnhill, 267 N.C. 457, 148 S.E.2d 536 (1966).

Applied in Robinette v. Wike, 265 N.C. 551, 144 S.E.2d 594 (1965); Kidd v. Burton, 269 N.C. 267, 152 S.E.2d 162 (1967).

§ 1-169. Total failure of proof.

Editor's Note.—For case law survey on pleading and parties, see 43 N.C.L. Rev. 873 (1965).

Nonsuit Proper.—Where there is a variance between allegation and proof, amounting to the allegation of one cause of action and proof of another, a nonsuit is proper. In such case there has been a failure by the plaintiff to prove the cause of action alleged in his complaint. McCrillis v. A & W Enterprises, Inc., 270 N.C. 637, 155 S.E.2d 281 (1967).

SUBCHAPTER VII. PRE-TRIAL HEARINGS; TRIAL AND ITS INCIDENTS.

Article 18A.

Pre-Trial Hearings.

§ 1-169.1. Pre-trial dockets and cases placed thereon; pre-trial orders; time for hearings and matters for consideration.

Editor's Note.—

For additional comment on this article, see 36 N. C. Law Rev. 521.

For case law survey on trial practice, see 43 N.C.L. Rev. 938 (1965).

The purpose of a pre-trial conference under this section is to consider specifics mentioned in the statute; among them, motions to amend pleadings, issues, references, admissions, judicial notice, and other matters which may aid in the deposition of the cause. Whitaker v. Beasley, 261 N.C. 733, 136 S.E.2d 127 (1964); Smith v. City of Rockingham, 268 N.C. 697, 151 S.E.2d 568 (1966).

Pre-trial order is interlocutory, from which an appeal does not lie. Green v. Western & Southern Life Ins. Co., 250 N.

C. 730, 110 S. E. (2d) 321 (1959); Smith v. City of Rockingham, 268 N.C. 697, 151 S.E.2d 568 (1966).

Subparagraph 7 fits into the framework of the pre-trial procedure. It is not a grant of authority to hear and determine disputed facts. Its order is interlocutory in nature. Whitaker v. Beasley, 261 N.C. 733, 136 S.E.2d 127 (1964); Smith v. City of Rockingham, 268 N.C. 697, 151 S.E.2d 568 (1966).

ARTICLE 19.

Trial.

§ 1-170. Defined.

Editor's Note.—For case law survey as to trial practice, see 44 N.C.L. Rev. 1054 (1966).

Stated in Erickson v. Starling, 235 N. C. 643, 71 S. E. (2d) 384 (1952).

§ 1-171. Joinder of issue and trial.

Cause Transmitted by Operation of Law.—

In accord with original. See Rich v. Norfolk Southern Ry. Co., 244 N. C. 175, 92 S. E. (2d) 768 (1956).

Applied in Flynt v. Flynt, 237 N. C. 754, 75 S. E. (2d) 901 (1953).

Cited in Boone v. Sparrow, 235 N. C. 396, 70 S. E. (2d) 204 (1952).

§ 1-172. How issue tried.

Editor's Note.—For article on trial by jury in equity cases, see 31 N. C. Law Rev. 157.

Entitled to Jury Trial.—

Issues of law must be tried by the judge; but issues of fact must be tried by a jury, unless trial by jury is waived. This is true even though the issues of fact are raised by pleadings in actions for the enforcement of equitable rights. Erickson v Starling, 235 N. C. 643, 71 S. E. (2d) 384 (1952). See Remsen v. Edwards, 236 N C. 427, 72 S. E. (2d) 879 (1952).

Under this section, the parties have the right to have the issues of fact joined on the pleadings tried by a jury, and any motion which calls on the judge to usurp the function of that body should be denied. State v. Ponter, 234 N. C. 294, 67 S. E. (2d) 292 (1951).

Where issues of fact are raised by the pleadings in a cause and trial by jury is not waived, the verdict of a jury determining the issues of fact is an indispensable step in the trial of the cause, and the court is without power to enter a final judgment in the absence of such verdict. Erickson v. Starling, 235 N. C. 643, 71 S. E. (2d) 384 (1952).

Where there is nothing in the record to indicate that petitioner and respondent have waived their constitutional and statutory right to have the issue of fact joined on the pleadings tried by a jury, and there is no question of reference, the judge had no authority to enter an order affirming the order of the assistant clerk of the superior court, which in effect was a determination by the judge of the issue of fact raised by the pleadings and a finding by him that money deposited in the office of the clerk of the superior court was funds belonging to a decedent and in order that said money be distributed to the administrator c.t.a. of her last will and testament. In the Matter of Wallace, 267 N.C. 204, 147 S.E.2d 922 (1966).

Right Exists Only When Issue of Fact Arises.—The law confers upon the parties to a civil action the right to a jury trial when, and only when, an issue of fact arises of the pleadings. Wells v. Clayton, 236 N C. 102, 72 S. E. (2d) 16 (1952).

What Is Issue of Fact.—An issue of fact arises on the pleadings whenever a material fact is maintained by one party and controverted by the other. A material fact is one which constitutes a part of the plaintiff's cause of action or the defendant's defense. Wells v. Clayton, 236 N. C. 102, 72 S E. (2d) 16 (1952).

Trial of Case on Agreed Statement of Facts.—See U Drive It Auto Co. v. Atlantic Fire Ins. Co., 239 N. C. 416, 80 S. E. (2d) 35 (1954).

Trial of Small Claims in Forsyth County.—Chapter 1057, Session Laws of 1951, providing for the trial of small claims in Forsyth County, to the effect that no jury trial shall be had in an action instituted pursuant thereto, unless a demand is made therefor in the manner set out in the act, and the costs advanced and the prosecution bond filed as required therein, Better Home Furniture Co. v. Baron, 243

is not unreasonable and will be upheld. N. C. 502, 91 S. E. (2d) 236 (1956).

Applied in Crew v. Crew, 236 N. C. 528, 73 S. E. (2d) 309 (1952); Flynt v. Flynt, 237 N. C. 754, 75 S. E. (2d) 901 (1953); Iowa Mut. Ins. Co. v. Fred M. Simmons, Inc., 258 N. C. 69, 128 S. E. (2d) 19 (1962); Jewell v. Price, 259 N. C. 345, 130 S. E. (2d) 668 (1963); University Motors, Inc. v. Durham Coca-Cola Bottling Co., 266 N.C. 251, 146 S.E.2d 102 (1966).

Quoted in part in Icenhour v. Bowman, 233 N. C. 434, 64 S. E. (2d) 428 (1951); Baker v. Malan Constr. Corp., 255 N. C. 302, 121 S. E. (2d) 731 (1961).

Stated in Cauble v. Bell, 249 N. C. 722, 107 S. E. (2d) 557 (1959).

Cited in In re Housing Authority, 235 N. C. 463, 70 S. E. (2d) 500 (1952); Ingle v. McCurry, 243 N. C. 65, 89 S. E. (2d) 745 (1955); Herring v. Volume Merchandise, Inc., 249 N. C. 221, 106 S. E. (2d) 197 (1958); Chappell v. Winslow, 258 N. C. 617, 129 S. E. (2d) 101 (1963).

§ 1-173. Issues of fact.—Every issue of fact joined on the pleadings, and inquiry of damages ordered to be tried by a jury, must be tried at the term of the court next ensuing the joinder of issue or order for inquiry, if the issue was joined or order made more than ten days before such term, but if not, they may be tried at the second term after the joinder or order. Provided, that uncontested cases in which no answer has been filed may be tried at any term after the time for filing answers has expired. Provided, further, that the word "term", as used in this section, shall be construed to mean each calendar week of a term, where it is for more than one week. Provided further, that uncontested divorce cases in which no answer has been filed may be tried at any time after the time for filing answer has expired, regardless of when the term of court began. (C. C. P., s. 226; Code, s. 400; Rev., s. 528; C. S., s. 557; 1923, c. 54; 1925, c. 5; 1945, c. 989; 1953, c. 190, 1955, c. 181.)

Editor's Note.—

The 1953 amendment added the second proviso, and the 1955 amendment added the last proviso.

This section is mandatory in the requirement that an issue or issues of fact raised by the pleadings shall be submitted to the jury. Baker v. Malan Constr. Corp., 255 N. C. 302 121 S. E. (2d) 731 (1961).

It Distinguishes Issues of Fact from Inquiries of Damages.—This section in express terms distinguishes issues of fact from mere inquiries of damages. Baker v. Malan Constr. Corp., 255 N. C. 302, 121 S. E. (2d) 731 (1961).

Issues in a case are joined from and after the date of the filing of the answer of defendant, and defendant cannot be entitled as a matter of right under this section to a continuance where the case is set for trial the third week of a term beginning over a month after the issue is joined, when defendant is given notice some two weeks prior to the time of trial that plaintiff would withdraw his motion to strike matter from the answer. Becker v. Becker, 262 N.C. 685, 138 S.E.2d 507 (1964).

§ 1-174. Issues of fact before the clerk.

Preliminary questions of fact are to be decided by the clerk under this section. If he finds against the petitioner upon them, he dismisses the proceeding, and, if so advised, the petitioner excepts and appeals to the judge, who hears and decides the appeal. Kaperonis v. North Carolina State Highway Comm'n, 260 N.C. 587, 133 S.E.2d 464 (1963).

Quoted in In the Matter of Wallace, 267 N.C. 204, 147 S.E.2d 922 (1966).

Cited in Boone v. Sparrow, 235 N. C. 396, 70 S. E. (2d) 204 (1952).

§ 1-175. Continuance before term; affidavit.—A party to an action may apply to the court in which it is pending, or to the judge thereof, by affidavit, at least fifteen days before the trial term, and after three days' notice in writing to the adverse party, to have the trial continued to a term subsequent to that in which it is regularly triable. The court or judge may continue the trial as asked for, on such terms as may be just if satisfied—

(1) That the applicant has used due diligence to have his case ready for trial.

(2) That by reason of circumstances beyond his control, which he must set forth, he cannot have a fair trial at the regular trial term. If the

application is made by reason of the expected absence of a witness, it must state the name and residence of the witness, the facts expected to be proved by him, the grounds for the expectation of his non-attendance, and that the applicant expects to procure his evidence at or before some named subsequent term. The applicant must in all cases pay the costs of the application. (C. C. P., s. 227; Code, s. 401; Rev., s. 530; C. S., s. 559; 1959, c. 458.)

Editor's Note. — The 1959 amendment struck out the word "thirty" in line three and substituted therefor the words "at least fifteen."

Continuance Lies in Discretion of Judge.—

In accord with original. See Watters v. Parrish, 252 N. C. 787, 115 S. E. (2d) 1 (1960).

§ 1-176. Continuance during term.

Continuances are not favored, etc.—

In accord with original. See Cleeland v. Cleeland, 249 N. C. 16, 105 S. E. (2d) 114 (1958).

Continuance Discretionary with Judge.—

The granting or denial of a motion to continue is a matter in the sound discretion of the trial judge and will not be disturbed unless an abuse of discretion is made to appear. Cleeland v. Cleeland, 249 N. C. 16, 105 S. E. (2d) 114 (1958).

Whether one lawsuit will be held in abeyance to abide the outcome of another rests in the sound discretion of the trial judge, and his action will not be disturbed on appeal, unless the discretion has been abused, for there is power inherent in every court to control the disposition of causes on its docket with economy of time and effort for itself, for counsel, and for litigants. Watters v. Parrish, 252 N. C. 787, 115 S. E. (2d) 1 (1960).

Except Where Motion Is Based on Constitutional Right.—A motion for continuance is addressed to the sound discretion of the trial judge and his ruling thereon is not subject to review on appeal, except in a case of manifest abuse; however, when the motion is based on a right guaranteed by the federal and State Constitutions, the question presented is one of law and the order of the court is reviewable. State v. Phillip, 261 N.C. 263, 134 S.E.2d 386 (1964).

What Applicant Must Show.—To obtain a continuance of a cause to be tried at a time agreed upon, the applicant should show that he has used due diligence and that a fair trial cannot be had because of circumstances beyond his control. Cleeland v. Cleeland, 249 N. C. 16, 105 S. E. (2d) 114 (1958).

§ 1-179. Separate trials.

Cited in Gibbs v. Carolina Power & Light Co., 265 N.C. 459, 144 S.E.2d 393 (1965).

§ 1-180. Judge to explain law, but give no opinion on facts.

I. IN GENERAL.

Editor's Note.—

For article discussing this section and possible return to Rule 51, federal Rules of Civil Procedure, in North Carolina, see 36 N. C. Law Rev. 1.

For case law survey on trial practice, see 43 N.C.L. Rev. 938 (1965).

For case law survey as to expression of opinion by trial judge, see 44 N.C.L. Rev. 1065 (1966).

Purpose of Section. — The founders of our legal system intended that the right of trial by jury should be a vital force in the administration of justice. They realized that this could not be if the petit jury should become a mere unthinking echo of the judge's will. To forestall such eventuality, they clearly demarcated the respective functions of the judge and the jury in both civil and criminal trials in the familiar statute now embodied in this section. In re Bartlett's Will, 235 N. C. 489, 70 S. E. (2d) 482 (1952).

This section establishes these fundamental propositions: (1) That it is the duty of the judge alone to decide legal questions presented at the trial, and to instruct the jury as to the law arising on the evidence given in the case; (2) that it is the task of the jury alone to determine the facts of the case from the evidence adduced; and (3) that "no judge, in giving a charge to the petit jury, shall give an opinion whether a fact is fully or sufficiently proven, that being the true office and province of the

jury." This section is designed to make effectual the right of every litigant to have his cause considered with the "cold neutrality of the impartial judge" and the equally unbiased mind of a properly instructed jury. In re Bartlett's Will, 235 N. C. 489, 70 S. E. (2d) 482 (1952); State v. Canipe, 240 N. C. 60, 81 S. E. (2d) 173 (1954).

The provisions of this section are mandatory, and a failure to comply is prejudicial error. Therrell v. Freeman, 256 N. C. 552, 124 S. E. (2d) 522 (1962).

This section creates a substantial legal right in the parties. Adams v. Beaty Service Co., 237 N. C. 136, 74 S. E. (2d) 332 (1953).

It is a departure from the common-law rule and from the practice which prevails in the English courts, the federal courts, and in the courts of some of the states. Everette v. D. O. Briggs Lumber Co., 250 N. C. 688, 110 S. E. (2d) 288 (1959).

And is to be strictly construed. Everette v. D. O. Briggs Lumber Co., 250 N. C. 688, 110 S. E. (2d) 288 (1959).

It has no application where the parties waive trial by jury. Everette v. D. O. Briggs Lumber Co., 250 N. C. 688, 110 S. E. (2d) 288 (1959).

Judge Not to Invade Prerogative of Jury.—This section denies the judge presiding at a jury trial the right in any manner or in any form, by word of mouth or by action, to invade the prerogative of the jury in its right to find the facts. In re Holcomb's Will, 244 N. C. 391, 93 S. E. (2d) 454 (1956).

The sole purpose of the portion of this section as to giving an opinion, is to prevent judges from invading the province of the jury. Everette v. D. O. Briggs Lumber Co., 250 N. C. 688, 110 S. E. (2d) 288 (1959).

Failure of the judge to observe and comply with the provisions of this section is error for which a new trial must be ordered. Adams v. Beaty Service Co., 237 N. C. 136, 74 S. E. (2d) 332 (1953).

This section requires that the judge shall declare and explain the law arising on the evidence given in the case. This is a substantial right of litigants. Failure to observe it is error for which the injured party is entitled to a new trial. State v. Jones, 254 N. C. 450, 119 S. E. (2d) 213 (1961).

Applied in Dillard v. Brown, 233 N. C. 551, 64 S. E. (2d) 843 (1951); Howard v. Carman, 235 N. C. 289, 69 S. E. (2d) 522 (1952); In re Humphrey, 236 N. C. 141, 71 S. E. (2d) 915 (1952); Fleming v. Atlantic Coast Line R. Co., 236 N. C. 568, 73 S. E. (2d) 544 (1952); Goodwin v. Green, 237 N. C. 244, 74 S. E. (2d) 630 (1953); State v. Williamson, 238 N. C. 652, 78 S. E. (2d) 763 (1953); Honeycutt v. Bryan, 240 N. C. 238, 81 S. E. (2d) 653 (1954); Murray v. Wyatt, 245 N. C. 123, 95 S. E. (2d) 541 (1956); State v. Robbins, 246 N. C. 332, 98 S. E. (2d) 309 (1957); State v. Dutch, 246 N. C. 438, 98 S. E. (2d) 475 (1957); Poindexter v. First Nat. Bank, 247 N. C. 606, 101 S. E. (2d) 682 (1958); DeBruhl v. State Highway & Public Works Comm., 247 N. C. 671, 102 S. E. (2d) 229 (1958); State v. Brown, 251 N. C. 216, 110 S. E. (2d) 892 (1959); North Asheboro-Central Falls Sanitary Dist. v. Canoy, 252 N. C. 749, 114 S. E. (2d) 577 (1960); In re Sessoms' Will, 254 N. C. 369, 119 S. E. (2d) 193 (1961); Graver v. Rundle, 255 N. C. 744, 122 S. E. (2d) 720 (1961); General Tire & Rubber Co. v. Distributors, Inc., 256 N. C. 561, 124 S. E. (2d) 508 (1962); Wagner v. Eudy, 257 N. C. 199, 125 S. E. (2d) 598 (1962); Teer Co. v. Dickerson, Inc., 257 N. C. 522, 126 S. E. (2d) 500 (1962); Yates v. W. F. Mickey Body Co., Inc., 258 N. C. 16, 128 S. E. (2d) 11 (1962); Hewett v. Bullard, 258 N. C. 347, 128 S. E. (2d) 411 (1962); Queen v. Jarrett, 258 N. C. 405, 128 S. E. (2d) 894 (1963); Pettus v. Sanders, 259 N. C. 211, 130 S. E. (2d) 330 (1963); State Highway Comm'n v. Kenan Oil Co., 260 N.C. 131, 131 S.E.2d 665 (1963); State v. Harrington, 260 N.C. 663, 133 S.E.2d 452 (1963); Bassinov v. Finkle, 261 N.C. 109, 134 S.E.2d 130 (1964); State v. Goldberg, 261 N.C. 181, 134 S.E.2d 334 (1964); State v. Bailey, 261 N.C. 783, 136 S.E.2d 37 (1964); State v. Lawrence, 262 N.C. 162, 136 S.E.2d 595 (1964); Bell v. Price, 262 N.C. 490, 137 S.E.2d 824 (1964); Adams v. Adams, 262 N.C. 556, 138 S.E.2d 204 (1964); State v. Morgan, 263 N.C. 400, 139 S.E.2d 708 (1965); State v. Summers, 263 N. C. 517, 139 S.E.2d 627 (1965); Upchurch v. Hudson Funeral Home, Inc., 263 N.C. 560, 140 S.E.2d 17 (1965); Pinyan v. Settle, 263 N.C. 578, 139 S.E.2d 863 (1965); State v. Fenner, 263 N.C. 694, 140 S.E.2d 349 (1965); Duke Power Co. v. Black, 263 N.C. 811, 140 S.E.2d 540 (1965); State v. Carroll, 265 N.C. 592, 144 S.E.2d 656 (1965); State v. Bynum, 265 N.C. 732, 145 S.E.2d 5 (1965); Haynie v. Queen, 266 N.C. 758, 147 S.E.2d 188 (1966); State v. Green, 266 N.C. 785, 147 S.E.2d 377 (1966); State v. Matthews, 267 N.C. 244, 148 S.E.2d 38 (1966); State v. Leake, 267 N.C. 662, 148 S.E.2d 630 (1966); State v. Turner, 268 N.C. 225, 150 S.E.2d 406 (1966); State

v. Fields, 268 N.C. 456, 150 S.E.2d 852 (1966); State v. Barber, 268 N.C. 509, 151 S.E.2d 51 (1966); State v. Green, 268 N.C. 690, 151 S.E.2d 606 (1966); Griffin v. Watkins, 269 N.C. 650, 153 S.E.2d 356 (1967); Murchison v. Powell, 269 N.C. 656, 153 S.E.2d 352 (1967); State v. Barber, 270 N.C. 222, 154 S.E.2d 104 (1967); State v. Tippett, 270 N.C. 588, 155 S.E.2d 269 (1967); State v. Cooke, 270 N.C. 644, 155 S.E.2d 165 (1967); State v. Jent, 270 N.C. 652, 155 S.E.2d 171 (1967).

Stated in Short v. Chapman, 261, N.C. 674, 136 S.E.2d 40 (1964).

Cited in Morris v. Wrape, 233 N. C. 462, 64 S. E. (2d) 420 (1951); State v. Russell, 233 N. C. 487, 64 S. E. (2d) 579 (1951); State v. Parker, 234 N. C. 236, 66 S. E. (2d) 907 (1951); Poniros v. Nello L. Teer Co., 236 N. C. 144, 72 S. E. (2d) 9 (1951); Macon v. Murray, 236 N. C. 484, 73 S. E. (2d) 165 (1952); Atlantic Coast Line R. Co. v. McLean Trucking Co., 238 N. C. 422, 78 S. E. (2d) 159 (1953); Mills v. Bonin, 239 N. C. 498, 80 S. E. (2d) 365 (1954); McDevitt v. Chandler, 241 N. C. 677, 86 S. E. (2d) 438 (1955); State v. Phelps, 242 N. C. 540, 89 S. E. (2d) 132 (1955); Tillman v. Talbert, 244 N. C. 270, 93 S. E. (2d) 101 (1956); Lowe v. Department of Motor Vehicles, 244 N. C. 353, 93 S. E. (2d) 448 (1956); State v. Crisp, 244 N. C. 407, 94 S. E. (2d) 402 (1956); Deaton v. Coble, 245 N. C. 190, 95 S. E. (2d) 569 (1956); State v. Morgan, 245 N C. 215, 95 S. E. (2d) 507 (1956); Taylor v. Hunt, 248 N. C. 330, 103 S. E. (2d) 287 (1958); State v. Jones, 249 N. C. 134, 105 S. E. (2d) 513 (1958); State v. Corl, 250 N. C. 258, 108 S. E. (2d) 615 (1959); Warner v. Gulf Oil Corp., 178 F. Supp. 481 (1959); State v. Gooding, 251 N. C. 175, 110 S. E. (2d) 865 (1959); State v. Grundler, 251 N C. 177, 111 S. E. (2d) 1 (1959); Tillis v. Calvine Cotton Mills, Inc., 251 N. C. 359, 111 S. E. (2d) 606 (1959); Gauldin v. Stokes Lumber Co., 253 N C. 579, 117 S. E. (2d) 393 (1960); Crown Central Petroleum Corp. v. Page-Myers Oil Co., 255 N. C. 167, 120 S. E. (2d) 594 (1961); State v. Hart, 256 N. C. 645, 124 S. E. (2d) 816 (1962); Clifton v. Turner, 257 N. C. 92, 125 S. E. (2d) 339 (1962); Phillips v. North Carolina R. Co., 257 N. C. 239, 125 S. E. (2d) 603 (1962); Carter v. Bradford, 257 N. C. 481, 126 S. E. (2d) 158 (1962); Haltiwanger v. Charlotte Amusement Co., 261 N.C. 180, 134 S.E.2d 198 (1964); Massey v. Smith, 262 N.C. 611, 138 S.E.2d 237 (1964); Brown v. Griffin, 263 N.C. 61, 138 S.E.2d 823 (1964); Slaughter v. Slaughter, 264 N.C. 732, 142 S.E.2d 683 (1965); Consolidated Vending Co. v. Turner, 267 N.C. 576, 148 S.E.2d 531 (1966); Wooten v. Cagle, 268 N.C. 366, 150 S.E.2d 738 (1966); Underwood v. Gay, 268 N.C. 715, 151 S.E.2d 590 (1966); Chalmers v. Womack, 269 N.C. 433, 152 S.E.2d 505 (1967); State v. Fuller, 270 N.C. 710, 155 S.E.2d 286 (1967); Gregory v. Lynch, 271 N.C. 198, 155 S.E.2d 488 (1967).

II. OPINION OF JUDGE.

A. General Consideration.

Purposes and Effect of Section.—

In accord with 2nd paragraph in original. See State v. Belk, 268 N.C. 320, 150 S.E.2d 481 (1966).

In accord with 5th paragraph in original. See State v. Shinn, 234 N. C. 397, 67 S. E. (2d) 270 (1951); Belk v. Schweizer, 268 N.C. 50, 149 S.E.2d 565 (1966).

The law imposes on the trial judge the duty of absolute impartiality. The expression of an opinion by the trial court on an issue of fact to be submitted to a jury, being prohibited by this section, is a legal error. Nowell v. Neal, 249 N. C. 516, 107 S. E. (2d) 107 (1959); Belk v. Schweizer, 268 N.C. 50, 149 S.E.2d 565 (1966).

The court in its charge may not intimate or express an opinion as to the facts, the weight of the evidence, or the credibility of the witnesses, either directly or indirectly, in any manner, and if the judge does intimate or express such an opinion, it is prejudicial. Belk v. Schweizer, 268 N.C. 50, 149 S.E.2d 565 (1966).

Every suitor is entitled by the law to have his cause considered with the cold neutrality of the impartial judge and the equally unbiased mind of a properly instructed jury. This right can neither be denied nor abridged. State v. Douglas, 268 N.C. 267, 150 S.E.2d 412 (1966).

The trial judge occupies an exalted station. Jurors entertain great respect for his opinion, and are easily influenced by any suggestion coming from him. As a consequence, he must abstain from conduct or language which tends to discredit or prejudice the accused or his cause with the jury. State v. Belk, 268 N.C. 320, 150 S.E.2d 481 (1966).

The judge occupies an exalted station, and jurors entertain a profound respect for his opinion. As a consequence, the judge prejudices a party or his cause in the minds of the trial jurors whenever he violates this section by expressing an adverse opinion on the facts. When this occurs, it is virtually impossible for the judge to re-

move the prejudicial impression from the minds of the trial jurors by anything which he may afterwards say to them by way of atonement or explanation. State v. Carter, 268 N.C. 648, 151 S.E.2d 602 (1966).

This section imposes upon the trial judge the duty to state in a plain and correct manner the evidence given in the case and to declare and explain the law arising thereon, without expressing any opinion of the facts. Stanback v. Stanback, 270 N.C. 497, 155 S.E.2d 221 (1967).

A Substantial Right, etc.—

Every person charged with crime has an absolute right to a fair trial. By this it is meant that he is entitled to a trial before an impartial judge and an unprejudiced jury in an atmosphere of judicial calm. State v. Belk, 268 N.C. 320, 150 S.E.2d 481 (1966).

This section forbids the judge to intimate his opinion, etc.—

In accord with original. See State v. Wallace, 251 N. C. 378, 111 S. E. (2d) 714 (1959).

This section has been construed to include any opinion or even an intimation of the judge, at any time during the trial, calculated to prejudice either of the parties with the jury. Everette v. D. O. Briggs Lumber Co., 250 N. C. 688, 110 S. E. (2d) 288 (1959).

The trial judge is expressly forbidden to convey to the jury in any manner at any stage of the trial his opinion as to how the jury should determine a question of fact. Hicks v. Guilford County, 267 N.C. 364, 148 S.E.2d 240 (1966).

This section forbids a judge to express to the jury his opinion on the facts of the case he is trying. State v. Douglas, 268 N.C. 267, 150 S.E.2d 412 (1966).

The trial judge is forbidden by this section to express an opinion upon the evidence in any manner during the course of the trial or in his instructions to the jury. State v. Belk, 268 N.C. 320, 150 S.E.2d 481 (1966).

The expression by the court in the presence of the jury of an opinion concerning a fact to be found by the jury is forbidden by this section. State v. Carter, 268 N.C. 648, 151 S.E.2d 602 (1966).

There must be no indication of the judge's opinion upon the facts to the hurt of either party, either directly or indirectly, by words or conduct. Stanback v. Stanback, 270 N.C. 497, 155 S.E.2d 221 (1967).

Section Not Confined to Charge.—

In accord with original. See In re Bartlett's Will, 235 N. C. 489, 70 S. E. (2d) 482 (1952).

Although this section refers in terms to the charge, it has always been construed to forbid the judge to convey to the trial jury in any way at any stage of the trial his opinion on the facts involved in the case. State v. Canipe, 240 N. C. 60, 81 S. E. (2d) 173 (1954).

This section does not apply to the charge alone, but prohibits a trial judge from asking questions or making comments at any time during the trial which amount to an expression of opinion as to what has or has not been shown by the testimony of a witness. Galloway v. Lawrence, 266 N.C. 245, 145 S.E.2d 861 (1966).

Section Applies Throughout Trial.—

In accord with 1st paragraph in original. See State v. Williamson, 250 N. C. 204, 108 S. E. (2d) 443 (1959); State v. Walker, 266 N.C. 269, 145 S.E.2d 833 (1966).

In accord with 2nd paragraph in original. See State v. Smith, 240 N. C. 99, 81 S. E. (2d) 263 (1954).

In accord with 3rd paragraph in original. See Hyder v. Asheville Storage Battery Co., 242 N. C. 553, 89 S. E. (2d) 124 (1955).

The trial of a case begins within the purview of this section when the prospective jurors are called to be examined touching their fitness to serve on the trial jury. This being so, it is a violation of the section for the judge to communicate his opinion on the facts in the case to the trial jury by his remarks or questions to prospective jurors during the selection of the trial jury. State v. Canipe, 240 N. C. 60, 81 S. E. (2d) 173 (1954).

Motive of Judge Immaterial.—

In accord with original. See State v. Shinn, 234 N. C. 397, 67 S. E. (2d) 270 (1951); State v. Smith, 240 N. C. 99, 81 S. E. (2d) 263 (1954).

Whether the conduct or the language of the judge amounts to an expression of his opinion on the facts is to be determined by its probable meaning to the jury, and not by the motive of the judge. State v. Canipe, 240 N. C. 60, 81 S. E. (2d) 173 (1954).

When Equal Protection Clause Violated. —The equal protection clause of the Fourteenth Amendment of the United States Constitution is not violated by prejudicial remarks of the judge unless there is shown to be an element of intentional or purposeful discrimination, and the burden of showing this is on the accused. Davis v. North Carolina, 196 F. Supp. 488 (1961), cert. denied 365 U. S. 855, 81 S. Ct. 816, 5 L. Ed. (2d) 819 (1961).

Inadvertent Expression of Opinion. — The fact that an expression of opinion by the trial court upon the evidence is an inadvertence renders such error nonetheless harmful. Miller v. Norfolk Southern Ry. Co., 240 N. C. 617, 83 S. E. (2d) 533 (1954); Burkey v. Kornegay, 261 N.C. 513, 135 S.E.2d 204 (1964).

Prejudicial Impression Not Removed by Subsequent Explanation. — The judge prejudices a party or his cause in the minds of the trial jurors whenever he violates this section by expressing an adverse opinion on the facts. When this occurs, it is virtually impossible for the judge to remove the prejudicial impression from the minds of the trial jurors by anything which he may afterwards say to them by way of atonement or explanation. State v. Canipe, 240 N. C. 60, 81 S. E. (2d) 173 (1954).

Once the trial judge has given, in the presence of the jury, the slightest intimation, directly or indirectly, of his opinion concerning a fact to be found by the jury or concerning the credibility of testimony given by a witness, such error cannot be corrected by instructing the jury not to consider the expression by the court. State v. Carter, 268 N.C. 648, 151 S.E.2d 602 (1966).

Weight and Sufficiency of Evidence, etc.—

Discrepancies and contradictions in the evidence are for the jury and not for the court. Jones v. Johnson, 267 N.C. 656, 148 S.E.2d 583 (1966).

If diverse inferences may be drawn from the evidence, some favorable to the plaintiff and others to the defendant, the case should be submitted to the jury for final determination. Jones v. Johnson, 267 N.C. 656, 148 S.E.2d 583 (1966).

Credibility of Witnesses Is for Jury.—

No judge at any time during the trial of a cause is permitted to cast doubt upon the testimony of a witness or to impeach his credibility. State v. Simpson, 233 N. C. 438, 64 S. E. (2d) 568 (1951); State v. Kimbrey, 236 N. C. 313, 72 S. E. (2d) 677 (1952); State v. Hopson, 265 N.C. 341, 144 S.E.2d 32 (1965). See State v. Smith, 240 N. C. 99, 81 S. E. (2d) 263 (1954).

This section prohibits a trial judge from asking questions which amount to an expression of opinion as to what has or has not been shown by the testimony of a witness, and from asking a witness questions for the purpose of impeaching him or casting doubt on his testimony. Greer v. Whittington, 251 N. C. 630, 111 S. E. (2d) 912 (1960).

Record on Appeal Must Show Error.—

In accord with 3rd paragraph in original. See State v. Thomas, 244 N. C. 212, 93 S. E. (2d) 63 (1956).

Correctness of Instructions, etc.—

Where the charge of the court to the jury does not appear in the record, it will be presumed that the court correctly charged the jury as to the law arising upon the evidence as required by this section. State v. Strickland, 254 N. C. 658, 119 S. E. (2d) 781 (1961).

B. What Constitutes an Opinion.

Direct Language Not Necessary, etc.—

In accord with 1st paragraph in original. See State v. Simpson, 233 N. C. 438, 64 S. E. (2d) 568 (1951); State v. Shinn, 234 N. C. 397, 67 S. E. (2d) 270 (1951).

It can make no difference in what way or manner or when the opinion of the judge is conveyed to the jury, whether directly or indirectly, by comment on the testimony of a witness, by arraying the evidence unequally in the charge, by imbalancing the contentions of the parties, by the choice of language in stating the contentions, or by the general tone and tenor of the trial. This section forbids any intimation of his opinion in any form whatever, it being the intent of the law to insure to each and every litigant a fair and impartial trial before the jury. State v. Simpson, 233 N. C. 438, 64 S. E. (2d) 568 (1951); Evans v. C. C. Bova & Co., 263 N.C. 91, 138 S.E.2d 781 (1964); State v. Belk, 268 N.C. 320, 150 S.E.2d 481 (1966).

If the judge intimates an opinion by his manner of stating the evidence, by imbalancing the contentions of the parties, by the choice of language in stating the contentions, or by the general tone and tenor of the trial, he violates this section. State v. Douglas, 268 N.C. 267, 150 S.E.2d 412 (1966).

It can make no difference in what way or when the opinion of the judge is conveyed to the jury, whether directly or indirectly, or by the general tone and tenor of the trial, this section forbids an intimation of his opinion in any form whatever, it being the intent of the law to insure to each and every litigant a fair and impartial trial before the jury. State v. McBryde, 270 N.C. 776, 155 S.E.2d 266 (1967).

Taking Witness into Custody, etc.—

Where the court audibly told the defendant's chief witness in the presence of the jury not to leave the courtroom, and shortly thereafter the witness was placed in custody in the prisoner's box in plain

view of the jury, the incident must have resulted in weakening the testimony of the witness in the eyes of the jury and constituted a violation of this section. State v. McBryde, 270 N.C. 776, 155 S.E.2d 266 (1967).

Intimation That Controverted Facts Have or Have Not Been Established.—Proof must be made without intimation or suggestion from the court that the controverted facts have or have not been established. State v. Mitchell, 260 N.C. 235, 132 S.E.2d 481 (1963).

Declaration That Evidence Tends to Show Fact Beyond Reasonable Doubt.—The credibility of the evidence is always for the jury and the judge may never declare that all the evidence tends to show any fact beyond a reasonable doubt. State v. Kimball, 261 N.C. 582, 135 S.E.2d 568 (1964).

Remark That Fact Is "Sufficiently Proved."—

No judge, in giving a charge to the petit jury, shall give an opinion whether a fact is fully or sufficiently proven, that being the true office and province of the jury. Williams v. State Highway Comm., 252 N. C 514, 114 S. E. (2d) 340 (1960).

Assumption That Fact Controverted by Plea of Not Guilty Has Been Established.—The assumption by the court that any fact controverted by a plea of not guilty has been established is prejudicial error. State v. Mitchell, 260 N.C. 235, 132 S.E.2d 481 (1963).

An expression of opinion or assumption by the trial court that all the essential elements of the offenses charged, which were controverted and put in issue by defendant's plea of not guilty, were not challenged and not denied by the defendant was prejudicial error. State v. Mitchell, 260 N.C. 235, 132 S.E.2d 481 (1963).

Remarks Must Be Prejudicial.—

In accord with 3rd paragraph in original. See State v. Hoover, 252 N. C. 133, 113 S. E. (2d) 281 (1960).

Burden of Showing Prejudice.—Petitioner has the burden of showing that the judge's remarks constituted prejudicial error. Davis v. North Carolina, 196 F. Supp. 488 (1961), cert. denied 365 U. S. 855, 81 S. Ct. 816, 5 L. Ed. (2d) 819 (1961).

The use of the convenient formula, etc.—

The use of the phrase "the State has presented evidence in this case which tends to show" in arraying the State's evidence, the same phrase being used when arraying defendant's evidence, did not constitute error as an expression of opinion by the court on the evidence. State v. Huggins, 269 N.C. 752, 153 S.E.2d 475 (1967).

Time Spent in Outlining Evidence of One Party.—

In accord with original. See Bryant v. Watford, 240 N. C. 333, 81 S. E. (2d) 926 (1954).

Questioning Witness.—A trial judge has undoubted power to interrogate a witness for the purpose of clarifying matters material to the issues. But he violates this section and commits reversible error in so doing if he puts to a witness questions which convey to the jury his opinion as to what has, or has not, been proved by the testimony of such witness. In re Bartlett's Will, 235 N. C. 489, 70 S. E. (2d) 482 (1952).

The presiding judge, in order to make for better understanding or clarification of what a witness has said or intended to say, or to develop some relevant fact overlooked, is entirely justified in propounding competent questions to a witness, but in doing so care should be exercised to prevent by manner or word what may be understood by the jury as the indirect expression of an opinion on the facts. State v. Kimbrey, 236 N. C. 313, 72 S. E. (2d) 677 (1952); Greer v. Whittington, 251 N. C. 630, 111 S. E. (2d) 912 (1960).

It is improper for a trial judge to ask questions which are reasonably calculated to impeach or discredit a witness. Cross-examination for the purpose of impeachment is the prerogative of counsel, including the district solicitor, but it is never the privilege of the trial judge. State v. Kimbrey, 236 N. C. 313, 72 S. E. (2d) 677 (1952).

Frequent Interruptions and Prolonged Questionings.—It is not unusual nor improper for a trial judge to ask questions of a witness to make clear his testimony on some point, and sometimes to facilitate the taking of testimony; but frequent interruptions and prolonged questionings by the court are not approved and may be held for prejudicial error if this tends to create in the minds of the jurors the impression of judicial leaning to one side or the other. Greer v. Whittington, 251 N. C. 630, 111 S. E. (2d) 912 (1960).

Assumption of Existence or Nonexistence of Material Fact.—The trial court in charging a jury may not give an instruction which assumes as true the existence or nonexistence of any material fact in issue. State v. Cuthrell, 235 N. C. 173, 69 S. E. (2d) 233 (1952).

Test for Determining Prejudice.—The trial judge must abstain from conduct or

language which tends to discredit or prejudice the accused or his cause with the jury. The bare possibility, however, that an accused may have suffered prejudice from the conduct or language of the judge is not sufficient to overthrow an adverse verdict. The criterion for determining whether or not the trial judge deprived an accused of his right to a fair trial by improper comments or remarks in the hearing of the jury is the probable effect of the language upon the jury. In applying this test, the utterance of the judge is to be considered in the light of the circumstances under which it was made. State v. Carter, 233 N. C. 581, 65 S. E. (2d) 9 (1951); Davis v. North Carolina, 196 F. Supp. 488 (1961), cert. denied 365 U. S. 855, 81 S. Ct. 816, 5 L. Ed. (2d) 819 (1961).

C. Illustrative Cases.

1. Remarks Held Not Erroneous.

c. Remarks Concerning Weight and Credibility of Testimony.

In prosecution for homicide committed in the attempted perpetration of a robbery, the charge of the court to the effect that if the jury were satisfied beyond a reasonable doubt that the defendants conspired and agreed to rob deceased, that one defendant committed acts in furtherance of the common design and agreed to share in the proceeds of the robbery, and that in furtherance of such plan and agreement, and while attempting to rob deceased, another defendant shot and killed deceased, the jury should return a verdict of guilty of murder in the first degree, was without error and did not contain an expression of opinion on the evidence in violation of this section. State v. Maynard, 247 N. C. 462, 101 S. E. (2d) 340 (1958).

d. Miscellaneous Remarks.

Statement of judge that he had only stated that part of the evidence as seemed to be necessary to enable him to explain and apply the law did not constitute an expression of opinion but was in strict son, 242 N. C. 574, 89 S. E. (2d) 138 compliance with this section. State v. Ty- (1955).

The court's statement of certain of plaintiff's contentions as set out in the record did not amount to the expression of an opinion as to the credibility of witnesses and weight of the evidence, where a reading of the record discloses that the trial judge stated contentions, not only those made by plaintiffs, but those made by the defendant, and there was nothing in the record and case on appeal to show that the contentions as stated by the judge were not actually made by the respective parties. Higgins v. Beaty, 242 N. C. 479, 88 S. E. (2d) 80 (1955).

Statement Concerning Benefits to Property Owners from Construction of Highway.—Where the court, in charging the jury on the issue of damages, correctly instructs the jury to deduct general and special benefits accruing to petitioner from the construction of the highway, and correctly leaves it to the jury to determine the amounts, the fact that the court also states that it is a matter of common knowledge that the building of a highway brings certain benefits to property owners along the highway is insufficient to constitute prejudicial error as an expression of opinion by the court on a fact in issue. Simmons v. North Carolina State Highway, etc., Comm., 238 N. C. 532, 78 S. E. (2d) 308 (1953).

2. Remarks Held Erroneous.

a. Remarks Concerning a Party to the Trial.

Reference by court to defendants as "three black cats in a white Buick" was prejudicial error affecting the credibility of the defendants as witnesses and injecting a prejudicial opinion of the court into the court's instructions. State v. Belk, 268 N.C. 320, 150 S.E.2d 481 (1966).

b. Remarks Concerning Witnesses.

Endorsing Veracity of Witness. — The court, after interrogating a witness in regard to his knowledge of the signature of the decedent, at issue in the case, stated that as far as the court was concerned the witness knew decedent's signature. It was held that the endorsement of the veracity of the witness by the court constitutes prejudicial error. In re Holcomb's Will, 244 N. C. 391, 93 S. E. (2d) 454 (1956).

Instruction That Arresting Officer Had No Personal Interest or Bias.—In a prosecution for driving while under the influence of intoxicating liquor, an instruction to the jury, based on a contention by the State, that the police officer who apprehended defendant had no personal interest in the case or bias toward defendant and that the officer's only interest was in seeing that the law was complied with and in protecting innocent people operating their automobiles on the highway, was a prohibited expression of opinion by the court, and its repetition by the judge, even though stated as a contention, gave it an emphasis that would weigh too heavily up-

on the defendant. State v. Maready, 269 N.C. 750, 153 S.E.2d 483 (1967).

Characterizing Witness as "of Perhaps Weak Mentality."—This section prohibits the judge from expressing an opinion that "plaintiff offered the testimony of (naming the witness), a young lady of perhaps weak mentality." Burkey v. Kornegay, 261 N.C. 513, 135 S.E.2d 204 (1964).

Questioning of witness by judge, going beyond an effort to obtain a proper understanding and clarification of the witness's testimony, held to have conveyed to the jury an impression that he had an opinion on the facts in evidence adverse to the defendant. State v. McRae, 240 N. C. 334, 82 S. E. (2d) 67 (1954).

c. Remarks Concerning Weight and Credibility of Testimony.

Court's inadvertent comment that defendant's testimony was incredible and therefore defendant should not be considered a credible witness was a violation of this section. State v. Hopson, 265 N.C. 341, 144 S.E.2d 32 (1965).

Characterizing Statutory Inference as "Deep Presumption". — In characterizing the permissible inference raised by § 18-11 as "a deep presumption," the trial judge expressed an opinion as to the strength of the evidence. Such an expression is prohibited by this section. State v. Tessnear, 265 N.C. 319, 144 S.E.2d 43 (1965).

Charge of Court Amounting to Erroneous Appraisal and Evaluation of Opinion Testimony.—See In re Tatum's Will, 233 N. C. 723, 65 S. E. (2d) 351 (1951).

d. Miscellaneous Remarks.

Remarks Made in Interrogating Prospective Jurors as to Scruples against Capital Punishment.—Where the court, in interrogating prospective jurors in regard to their scruples against capital punishment, refers to several celebrated cases and asks them, in the presence of those immediately thereafter impaneled to try the case, whether they would not render a verdict calling for the death sentence in such cases, defendant must be awarded a new trial notwithstanding that the court thereafter cautions the jurors that he did not mean to compare the case at issue with the other cases. State v. Canipe, 240 N. C. 60, 81 S. E. (2d) 173 (1954).

Regarding Duty to Furnish Additional Help. — The crucial question in this case was whether an employer was negligent in failing to provide an employee with additional help to perform the task which the employee was assigned to do alone. An instruction that if more than one person is required for the safe performance of a certain duty, "such as the one in question in this case," was held prejudicial error as an expression of opinion that the job in question required more than one man for its safe performance. Miller v. Norfolk Southern Ry. Co., 240 N. C. 617, 83 S. E. (2d) 533 (1954).

An instruction utilizing the expression "the defense of drunkenness is one which is dangerous in its application" is clearly an expression of opinion by a judge in giving a charge to a petit jury, which is prohibited by this section. State v. Oakes, 249 N. C. 282, 106 S. E. (2d) 206 (1958).

Instructions in Prosecutions for Driving under Influence of Intoxicating Liquors Held Prejudicial Where Defendant Stated to Be Driver. — See State v. Swaringen, 249 N. C. 38, 105 S. E. (2d) 99 (1958).

Instruction as to Result of Failure to Convict.—In a prosecution for driving a vehicle on a public highway while under the influence of intoxicating liquor, an instruction to the effect that the State contended the statute was enacted to protect life and property and if the jury should fail to "convict on this evidence, then the law or statute commonly referred to as 'the drunken driving' statute, would have no purpose and no effect" was held prejudicial as an expression of opinion by the court on the evidence. State v. Anderson, 263 N.C. 124, 139 S.E.2d 6 (1964).

In a prosecution for violations of the liquor laws the court, in explaining its ruling admitting testimony of a witness that he saw intimacies between girls and men on the occasion he purchased liquor at defendant's house, stated that "they both go hand in hand." The statement of the court was held prejudicial as intimating that evidence of the intimacy of the girls and men was direct proof of liquor dealings by defendant. State v. Williamson, 250 N. C. 204, 108 S. E. (2d) 443 (1959).

Quotations on Nagging Women in Divorce Action.—Where the court, charging the jury in a divorce action upon the nagging of a wife as constituting such indignity to the husband as to warrant a divorce a mensa et thoro, quoted a picturesque philippic on nagging and ended with a quotation from Proverbs on the difficulty of living with a brawling woman, the instruction, which must have been understood by the jury as a description of the wife's behavior, violated this section and constituted prejudicial error. Stanback v. Stanback, 270 N.C. 497, 155 S.E.2d 221 (1967).

For cases involving prejudicial comment, see Belk v. Schweizer, 268 N.C. 50, 149 S.E.2d 565 (1966).

III. EXPLANATION OF LAW AND EVIDENCE.

A. General Consideration of the Charge.

The Object of Instructions.—

In accord with 1st paragraph in original. See Western Conference of Original Free Will Baptists v. Miles, 259 N.C. 1, 129 S.E.2d 600 (1963); Parlier v. Barnes, 260 N.C. 341, 132 S.E.2d 684 (1963).

The chief purpose of a charge is to aid the jury to understand clearly the case, and to arrive at a correct verdict. Glenn v. Raleigh, 246 N. C. 469, 98 S. E. (2d) 913 (1957); Bulluck v. Long, 256 N. C. 577, 124 S. E. (2d) 716 (1962); Parlier v. Barnes, 260 N.C. 341, 132 S.E.2d 684 (1963); Faison v. T & S Trucking Co., 266 N.C. 383, 146 S.E.2d 450 (1966).

One of the most important purposes of the charge is the elimination of irrelevant matters and causes of action or allegations as to which no evidence has been offered, and to thereby let the jury understand and appreciate the precise facts that are material and determinative. Sugg v. Baker, 258 N. C. 333, 128 S. E. (2d) 595 (1962).

A charge to the jury should present, etc.

In accord with original. See Hawkins v. Simpson, 237 N. C. 155, 74 S. E. (2d) 331 (1953); Finch v. Ward, 238 N. C. 290, 77 S. E. (2d) 661 (1953).

The failure of the court to instruct the jury on substantive features of the case arising on the evidence is prejudicial error. This is true even though there is no special prayer for instructions to that effect. State v. Hornbuckle, 265 N.C. 312, 144 S.E.2d 12 (1965).

Charge Must Be Considered as a Whole.—

When the charge of the trial court was considered contextually as a whole, as the Supreme Court is required to do, it was held to be clear that the trial judge declared and explained the law arising on all phases of the evidence. Nance v Long, 250 N. C. 96, 107 S. E. (2d) 926 (1959).

A charge is not subject to the objection that the court failed to explain the law on a particular aspect of the case when the charge, considered contextually and in connection with an immediately prior instruction upon a related aspect, adequately states the evidence to the extent necessary to explain the application of the law upon the aspect in question. Lewis v. Barnhill, 267 N.C. 457, 148 S.E.2d 536 (1966).

Conflicting instructions upon a material aspect of the case must be held for prejudicial error, since it cannot be known which instruction was followed by the jury. Hardee v. York, 262 N.C. 237, 136 S.E.2d 582 (1964).

Charge Failing to Submit an Essential Element of Offense. — Where defendant testifies that he drove a vehicle on the highways of the State on the afternoon in question, then drank some wine and whiskey and became drunk about midafternoon, but denies that he drove a vehicle after becoming intoxicated, a charge to the effect that defendant admitted that he was drunk and that the only question for the jury was whether he drove his vehicle at any time on the afternoon in question, must be held for prejudicial error in failing to submit to the jury the essential element of the offense of whether defendant, while intoxicated, drove on a highway of the State, and in charging that an essential element of the offense had been fully or sufficiently proven when defendant's testimony was not sufficiently broad or comprehensive to constitute an admission of this fact. State v. Hairr, 244 N. C. 506, 94 S. E. (2d) 472 (1956).

Charge on Matters Not Raised in Pleadings or Supported by Evidence Is Erroneous.—It is error for the judge to charge the jury as to matters materially affecting the issues but not raised in the pleadings or supported by the evidence in the case. Modern Electric Co., Inc. v. Dennis, 259 N. C. 354, 130 S. E. (2d) 547 (1963).

Taking More Time in Stating State's Contentions.—That the court necessarily takes more time in stating the State's contentions than in stating the defendant's contentions is not ground for objection. State v. Sparrow, 244 N. C. 81, 92 S. E. (2d) 448 (1956).

The equal stress which this section requires to be given to contentions of the State and the defendant in a criminal action does not mean that the statement of the contentions of the State and of the defendant must be equal in length. State v. King, 256 N. C. 236, 123 S. E. (2d) 486 (1962).

In a trial where the evidence for the defendant is short, or where he may have chosen not to offer any evidence at all, his contentions will naturally be very few in contrast with those of the State where it may have introduced a great volume of testimony. State v. King, 256 N. C. 236, 123 S. E. (2d) 486 (1962).

Requests for Instructions Must Be Timely.—

Where the charge presents all substantive phases of the law arising upon the evidence, a party desiring instructions upon a subordinate feature must aptly tender a request therefor. Hennis Freight Lines, Inc. v. Burlington Mills Corp., 246 N. C. 143, 97 S. E. (2d) 850 (1957).

Presumption That Court Correctly Instructed Jury.—When the judge's charge is not shown in the record of case on appeal, it will be presumed that the court correctly instructed the jury on every principle of law applicable to the facts in evidence. State v. Sears, 235 N. C. 623, 70 S. E. (2d) 907 (1952); State v. Faison, 246 N. C. 121, 97 S. E. (2d) 447 (1957).

Appellant Must Show Error and Prejudice.—The burden is upon the appellant not only to show error in the action of the court concerning instructions but also to make it appear that the result was materially affected thereby to his hurt. And while the form and manner in which the instructions were given may be open to criticism, the Supreme Court will not intervene unless the appellant was prejudiced thereby. Garland v. Penegar, 235 N. C. 517, 70 S. E. (2d) 486 (1952).

Broadside Exception Untenable.—An exception that the court "did not charge the jury as to the law on every substantial feature of the case embraced within the issues and arising on the evidence" is untenable as a broadside exception. State v. Triplett, 237 N. C. 604, 75 S. E. (2d) 517 (1953).

Assignment of error that the judge failed "to explain and apply or correlate the law and highway safety statutes to the different phases of the evidence as provided in § 1-180" is too general and indefinite to present any question for decision. Unpointed, broadside exceptions will not be considered. State v. Woolard, 260 N.C. 133, 132 S.E.2d 364 (1963).

An assignment of error that the court failed to declare and explain the law applicable to the facts in the case, without pointing out what matters appellant contends were omitted, is a broadside exception. Lewis v. Parker, 268 N.C. 436, 150 S.E.2d 729 (1966).

An argument in an appellate brief that the court failed to charge "as to the contentions of the defendant in accordance with § 1-180" is a broadside exception which is not sufficient. State v. McCaskill, 270 N.C. 788, 154 S.E.2d 907 (1967).

The Supreme Court will not go "on a voyage of discovery" to ascertain wherein the judge failed to explain adequately the law in the case. State v. Woolard, 260 N.C. 133, 132 S.E.2d 364 (1963).

Assignment of Error Held Insufficient.—See Price v. Monroe, 234 N. C. 666, 68 S. E. (2d) 283 (1951).

B. Explanation Required.

1. In General.

Rule Stated.—

In accord with 1st paragraph in original. See Ammons v. North American Accident Ins. Co., 245 N. C. 655, 97 S. E. (2d) 251 (1957).

It is the duty of the trial court to apply the law to all substantial features of the case arising on the evidence. Ammons v. North American Accident Ins. Co., 245 N. C. 655, 97 S. E. (2d) 251 (1957); Whiteside v. McCarson, 250 N. C. 673, 110 S. E. (2d) 295 (1959).

This section imposes upon the trial judge the positive duty of declaring and explaining the law arising on the evidence as to all substantial features of the case. Saunders v. Warren, 267 N.C. 735, 149 S.E.2d 19 (1966).

The statute requires the judge to point out the essentials to be proved on the one side or the other, and to bring into focus the relations of the different phases of the evidence to the particular issues involved. Citizens Nat. Bank v. Phillips, 236 N. C. 470, 73 S. E. (2d) 323 (1952); Parlier v. Barnes, 260 N.C. 341, 132 S.E.2d 684 (1963); Miller v. Lucas, 267 N.C. 1, 147 S.E.2d 537 (1966). See Western Conference of Original Free Will Baptists v. Miles, 259 N.C. 1, 129 S.E.2d 600 (1963).

This section is complied with where the court fully instructs the jury as to the evidence and the contentions of the parties and defines the law applicable thereto. State v. McLean, 234 N. C. 283, 67 S. E. (2d) 75 (1951).

It is the duty of the court to state the evidence "to the extent necessary to explain the application of the law" arising thereon. In both civil and criminal cases, it is imperative, in the charge to the jury, that the law be declared, explained and applied to the evidence bearing on the substantial and essential features of the case without any request for special instructions. Brannon v. Ellis, 240 N. C. 81, 81 S. E. (2d) 196 (1954). See State v. Floyd, 241 N. C. 298, 84 S. E. (2d) 915 (1954).

A statement of the contentions of the parties together with a bare declaration

of the law in general terms is not sufficient to meet the requirements of the provisions of this section. It is imperative that the law be declared, explained, and applied to the evidence bearing on the substantial and essential features of the case. Hawkins v. Simpson, 237 N. C. 155, 74 S. E. (2d) 331 (1953).

Under this section, the trial judge is required to relate and apply the law to the variant factual situations having support in the evidence. Whiteside v. McCarson, 250 N. C. 673, 110 S. E. (2d) 295 (1959); Lester Bros. v. J. M. Thompson Co., 261 N.C. 210, 134 S.E.2d 372 (1964); Faison v. T & S Trucking Co., 266 N.C. 383, 146 S.E.2d 450 (1966).

The duty of a trial judge with respect to instructions to jurors is that "he shall declare and explain the law arising on the evidence." Hardee v. York, 262 N.C. 237, 136 S.E.2d 582 (1964).

The court is not required to give the jury a verbatim recital of the testimony. It must of necessity condense and summarize the essential features thereof. When its recital of the evidence does not correctly reflect the testimony of the witness in any particular respect, it is the duty of the counsel to call attention thereto and request a correction. Lewis v. Barnhill, 267 N.C. 457, 148 S.E.2d 536 (1966).

This section requires the trial judge to apply the law to the various factual situations presented by the conflicting evidence, thus where defendant's testimony, if the jury found it to be true, would entitle him to a verdict of not guilty, he was entitled to have the legal effect of his evidence explained to them. State v. Keziah, 269 N.C. 681, 153 S.E.2d 365 (1967).

Where the court failed to explain and declare the law arising on the evidence presented by the defendant, this constituted prejudicial error. State v. Hornbuckle, 265 N.C. 312, 144 S.E.2d 12 (1965).

Discretion of the Court.—

In giving instructions the court is not required to follow any particular form and has wide discretion as to the manner in which the case is presented to the jury, but it has the duty to explain, without special request therefor, each essential element of the offense and to apply the law with respect to each element to the evidence bearing thereon. State v. Mundy, 265 N.C. 528, 144 S.E.2d 572 (1965).

Compliance Necessary to Assure Verdict under Law and on Evidence.—Unless the mandatory provision of this section is complied with, there can be no assurance that the verdict represents a finding by the jury under the law and on the evidence presented. Parlier v. Barnes, 260 N.C. 341, 132 S.E.2d 684 (1963); Miller v. Lucas, 267 N.C. 1, 147 S.E.2d 537 (1966).

Contention of Parties.—

A trial judge is not required by law to state the contentions of litigants to the jury. When, however, a judge undertakes to state the contentions of one party, he must also give the equally pertinent contentions of the opposing party. Brannon v Ellis, 240 N. C. 81, 81 S. E. (2d) 196 (1954); State v. King, 256 N. C. 236, 123 S. E. (2d) 486 (1962); In re Will of Wilson, 258 N. C. 310, 128 S. E. (2d) 601 (1962); Watt v. Crews, 261 N.C. 143, 134 S.E.2d 199 (1964).

Where court gave the State's contentions on every phase of the testimony at great length and in detail, but gave the defendant's contentions in very brief, general terms, as though he had offered no evidence at all, the pertinent contentions arising from the defendant's evidence were not given as required by the provisions of this section. State v. Kluckhohn, 243 N. C. 306, 90 S. E. (2d) 768 (1956).

Whether a case on appeal discloses that the trial judge devoted more words, as shown by the number of printed lines, in stating contentions of plaintiff than in stating those of defendants, is not the test. It is a question whether the judge gives "equal stress" to the contentions of the plaintiff and of the defendant. Edgewood Knoll Apartments, Inc. v Braswell, 239 N. C. 560, 80 S. E. (2d) 653 (1954).

The equal stress, which this section requires be given to the contentions of the plaintiff and defendant in a civil action, does not mean that the statement of contentions of the respective parties must be equal in length. For instance, in a trial where the evidence of one party is very short, or he may have chosen not to introduce any evidence at all, his contentions will naturally be very few in contrast with the other party who may have introduced a great volume of testimony. Brannon v. Ellis, 240 N. C. 81, 81 S. E. (2d) 196 (1954).

An exception by the defendant charging that the judge gave unequal stress to the contentions of the State and the defendant, where the defendant offered no evidence, was held to be unfounded. State v. Smith, 238 N. C. 82, 76 S. E. (2d) 363 (1953).

Where the judge in his charge stated that it had taken longer to give a summary of the State's evidence than the defendants', but the jury were to attach no significance to that, and he gave equal

stress to the contentions of the State and of the defendants, this was held not error. State v. Smith, 237 N. C. 1, 74 S. E. (2d) 291 (1953).

Where the evidence of each party is approximately equal, a charge of the court which states the contentions of one party in grossly disproportionate length must be held for prejudicial error. Pressley v. Godfrey, 263 N.C. 82, 138 S.E.2d 770 (1964).

Where the court stated fully the contentions of the State but stated no contentions of defendant, the charge does not meet the requirement of this section as interpreted and applied in our decisions. State v. Crawford, 261 N.C. 658, 135 S.E.2d 652 (1964).

The trial judge failed to comply with the provisions of this section in that, after stating fully the contentions of the State, he failed to give equal stress to the contentions of defendant, and particularly to his contention that the State's evidence did not show any felonious intent to commit larceny. State v. Crawford, 261 N.C. 658, 135 S.E.2d 652 (1964).

Failure of the court to state the contention of defendant that the State's evidence completely failed to show that he had a felonious intent to commit larceny was highly prejudicial to defendant. State v. Crawford, 261 N.C. 658, 135 S.E.2d 652 (1964).

A charge gave proper balance to the contentions of the parties, although it was somewhat out of the ordinary in that, instead of reciting the evidence and applying the law thereto, the court interlaced and combined into one fabric the ultimate facts which, according to the contention of each party, the evidence established, and then applied the law thereto. Davis v. Parnell, 262 N.C. 616, 138 S.E.2d 285 (1964).

Where the court gives the contentions of the State and then states that it does not know what defendant contends, the instruction must be held prejudicial as contravening this section. State v Robbins, 243 N. C. 161, 90 S. E. (2d) 322 (1955).

Explanation of Subordinate Features of Case.—

When a judge has charged generally on the essential features of the case, if a litigant desires that some subordinate feature of the cause or some particular phase of the testimony shall be more fully explained, he should call the attention of the court to it by prayers for instructions or other proper procedure. And where this is not done, objection may not be raised for the first time after trial. Peek v. Wachovia Bank & Trust Co., 242 N C. 1, 86 S. E. (2d) 745 (1955); State v. Davis, 246 N C. 73, 97 S. E (2d) 444 (1957).

The court is not required to instruct on subordinate features of the case without a proper request therefor. Sugg v. Baker, 258 N. C. 333, 128 S. E. (2d) 595 (1962).

A party desiring further elaboration on a subordinate feature of the case must aptly tender request for further instructions. State v. Guffey, 265 N.C. 331, 144 S.E.2d 14 (1965).

An exception to an excerpt from the charge ordinarily does not challenge the omission of the court to charge further on the same or another aspect of the case. Peek v. Wachovia Bank & Trust Co., 242 N. C. 1, 86 S. E. (2d) 745 (1955)

An instruction does not constitute an adequate charge on contributory negligence where, in essence, it is a statement of the contentions of the parties with respect thereto and not a declaration and explanation of the law arising on the applicable evidence as contemplated by this section. Dixon v. Wiley, 242 N. C. 117, 86 S. E. (2d) 784 (1955).

Failure to Charge on Concurring Negligence.—Tillman v. Bellamy, 242 N. C. 201, 87 S. E. (2d) 253 (1955).

2. Statement of Evidence.

In General.—

A summary of the material aspects of the evidence sufficient to bring into focus controlling legal principles is all that is required with respect to stating the evidence. Sugg v. Baker, 258 N. C. 333, 128 S. E. (2d) 595 (1962).

This section requires, on the part of the judge, a statement of the evidence to which he is attempting to apply the law. State v. Best, 265 N.C. 477, 144 S.E.2d 416 (1965).

The trial judge is not required to instruct the jury with any greater particularity upon any element of the offense than is necessary to enable the jury to apply the law with respect to such element to the evidence bearing thereon. State v. Spratt, 265 N.C. 524, 144 S.E.2d 569 (1965).

Recapitulation Unnecessary.—

The recapitulation of all the evidence is not required under this section, and nothing more is required than a clear instruction which applies the law to the evidence and gives the position taken by the parties as to the essential features of the case. State v. Thompson, 257 N. C. 452, 126 S. E. (2d) 58 (1962).

The court is not required to recapitulate the evidence, witness by witness. Sugg v.

Baker, 258 N. C. 333, 128 S. E. (2d) 595 (1962); State v. Guffey, 265 N.C. 331, 144 S.E.2d 14 (1965).

Where no evidence is stated except in the contentions of the parties, that does not meet the requirements of this section. Bulluck v. Long, 256 N. C. 577, 124 S. E. (2d) 716 (1962).

Contentions of Parties.—

A statement of the evidence only in the form of contentions in a complicated case where the evidence is conflicting is not a sufficient compliance with the requirements of this section. Eastern Carolina Feed & Seed Co., Inc. v. Mann, 258 N. C. 771, 129 S. E. (2d) 488 (1963).

Where Parties Waive Recapitulation of Evidence.—Even when the parties waive a recapitulation of the evidence, it is necessary that the court state the evidence to the extent necessary to explain the application of the law thereto. State v. Floyd, 241 N. C. 298, 84 S. E. (2d) 915 (1954).

3. Explanation of Law.

In General.—

In accord with 1st paragraph in original. See Howard v. Carman, 235 N. C. 289, 69 S. E. (2d) 522 (1952); State v. Floyd, 241 N. C. 298, 84 S. E. (2d) 915 (1954); McNeill v. McDougald, 242 N. C. 255, 87 S. E. (2d) 502 (1955); Westmoreland v. Gregory, 255 N. C. 172, 120 S. E. (2d) 523 (1961).

In accord with 2nd paragraph in original. See Howard v. Carman, 235 N. C. 289, 69 S. E. (2d) 522 (1952); State v. Floyd, 241 N. C. 298, 84 S. E. (2d) 915 (1954).

In accord with 3rd paragraph in original. See Howard v. Carman, 235 N. C. 289, 69 S. E. (2d) 522 (1952).

The failure of the presiding judge to declare and explain the law arising upon the evidence is error. Howard v. Carman, 235 N. C. 289, 69 S. E. (2d) 522 (1952).

The Supreme Court has consistently ruled that this section imposes upon the trial judge the positive duty of declaring and explaining the law arising on the evidence as to all the substantial features of the case. A mere declaration of the law in general terms and a statement of the contentions of the parties is not sufficient to meet the statutory requirement. Glenn v. Raleigh, 246 N. C. 469, 98 S. E. (2d) 913 (1957); Rowe v. Fuquay, 252 N. C. 769, 114 S. E. (2d) 631 (1960); Byrnes v. Ryck, 254 N. C. 496, 119 S. E. (2d) 391 (1961); Parlier v. Barnes, 260 N.C. 341, 132 S.E.2d 684 (1963); Miller v. Lucas, 267 N.C. 1, 147 S.E.2d 537 (1966).

It is the duty of the trial court to declare and explain the law arising on the evidence as to all substantial features of the case, without any special prayer for instructions to that effect, and a mere declaration of the law in general terms and a statement of the contentions of the parties is insufficient. Therrell v. Freeman, 256 N. C. 552, 124 S. E. (2d) 522 (1962).

Where the trial court states the contentions of the parties, but inadvertently fails to explain and declare the law arising on the evidence, assignment of error to the charge must be sustained. Keith v. Lee, 246 N. C. 188, 97 S. E. (2d) 859 (1957).

A mere statement of the contentions of the parties does not suffice. Patterson v. Buchanan, 265 N.C. 214, 143 S.E.2d 76 (1965).

Where the court did not state any of the evidence except in the form of contentions, this does not comply with the requirement of this section that the judge "shall declare and explain the law arising on the evidence given in the case." Faison v. T & S Trucking Co., 266 N.C. 383, 146 S.E.2d 450 (1966).

The judge must explain and apply the law to the specific facts pertinent to the issue involved. Saunders v. Warren, 267 N.C. 735, 149 S.E.2d 19 (1966).

A mere declaration of the law in general terms and a statement of the contentions of the parties with respect to a particular issue is not sufficient to meet the requirements of the statute. Saunders v. Warren, 267 N.C. 735, 149 S.E.2d 19 (1966).

When the judge fails to declare and explain the law and apply it to the evidence bearing on the issue involved, the jurors, unfamiliar with legal standards, are left without benefit of such legal standards or standards necessary to guide them to a right decision on the issue. Saunders v. Warren, 267 N.C. 735, 149 S.E.2d 19 (1966).

The provisions of this section are mandatory. A failure to comply is prejudicial error. Godwin v. Hinnant, 250 N. C. 328, 108 S. E. (2d) 658 (1959).

If the mandatory requirements of this section are not observed, there can be no assurance that the verdict represents a finding by the jury under the law and the evidence presented. Saunders v. Warren, 267 N.C. 735, 149 S.E.2d 19 (1966).

It confers a substantial legal right, and imposes upon the trial judge a positive duty, and his failure to charge the law on the substantial features of the case arising

on the evidence is prejudicial error, and this is true even without prayer for special instructions. Bulluck v. Long, 256 N. C. 577, 124 S. E. (2d) 716 (1962); Faison v. T & S Trucking Co., 266 N.C. 383, 146 S.E.2d 450 (1966).

The trial judge has the positive duty of instructing the jury as to the law upon all of the substantial features of the case. Lester Bros. v. J. M. Thompson Co., 261 N.C. 210, 134 S.E.2d 372 (1964).

Court Must Explain Law Arising on Evidence in Particular Case.—This section requires the court, in both criminal and civil actions, to declare and explain the law arising on the evidence in the particular case and not upon a set of hypothetical facts. State v. Street, 241 N. C. 689, 86 S. E. (2d) 277 (1955); State v. Campbell, 251 N. C. 317, 111 S. E. (2d) 198 (1959).

Even though the parties waive a recapitulation of the evidence, such waiver does not relieve the court of the duty to declare and explain the law arising on the evidence of the respective parties. Sugg v. Baker, 258 N. C. 333, 128 S. E. (2d) 595 (1962).

It is prejudicial error to instruct in regard to law not presented by the evidence. White v. Cothran, 260 N.C. 510, 133 S.E.2d 132 (1963).

Absence of Request for Special Instructions.—

In accord with 1st paragraph in original. See Barnes v Caulbourne, 240 N. C. 721, 83 S. E. (2d) 898 (1954); Tillman v. Bellamy, 242 N. C. 201, 87 S. E. (2d) 253 (1955); McNeill v. McDougald, 242 N C. 255, 87 S. E. (2d) 502 (1955); Williamson v. Clay, 243 N. C. 337, 90 S. E. (2d) 727 (1956); Whiteside v. McCarson, 250 N. C. 673, 110 S. E. (2d) 295 (1959); Lester Bros. v. J. M. Thompson Co., 261 N.C. 210, 134 S.E.2d 372 (1964).

Under this section it is obligatory for the trial judge to charge the jury as to the law upon every substantial feature of the case embraced within the issue and arising on the evidence without any special prayer for instruction to that effect. State v. Brady, 236 N. C. 295, 72 S. E. (2d) 675 (1952).

It is the duty of the court, without a request for special instructions, to explain the law and to apply it to the evidence on all substantial features of the case. Melton v. Crotts, 257 N. C. 121, 125 S. E. (2d) 396 (1962).

Failure to charge the law on a substantive feature of case arising on defendant's pleading, even in the absence of special request for such instruction, is prejudicial error for which defendant is entitled to a new trial. Correll v. David L. Hartness Realty Co., 261 N.C. 89, 134 S.E.2d 116 (1964).

The trial court is required to charge the law upon all substantial features of the case arising on the evidence, even though there is no request for special instructions. King v. Britt, 267 N.C. 594, 148 S.E.2d 594 (1966).

It is the duty of the court, without request for special instructions, to explain the law and to apply it to the evidence on all substantial features of the case and to apply the law to the various factual situations presented by the conflicting evidence. Smart v. Fox, 268 N.C. 284, 150 S.E.2d 403 (1966).

The mandate of this section is not met, etc.—

See Spencer v. McDowell Motor Co., 236 N. C. 239, 72 S. E. (2d) 598 (1952).

An abstract proposition of law **not** pointing to the facts of the case at hand and not pertinent thereto should not be given to the jury. McGinnis v. Robinson, 252 N. C. 574, 114 S. E. (2d) 365 (1960).

It is error for the court to charge upon an abstract principle of law which is not presented by the allegations and evidence. Textile Motor Freight, Inc. v. DuBose, 260 N.C. 497, 133 S.E.2d 129 (1963); Pressley v. Pressley, 261 N.C. 326, 134 S.E.2d 609 (1964); Hardee v. York, 262 N.C. 237, 136 S.E.2d 582 (1964).

Charge Containing Only Declarations, etc.—

It is error for the court to charge on abstract principles of law not supported by any view of the evidence. Jordan v. Eastern Transit & Storage Co., 266 N.C. 156, 146 S.E.2d 43 (1966).

Declaration of legal principles in anticipation that they will arise on the evidence may conceivably lead to serious error. Hardee v. York, 262 N.C. 237, 136 S.E.2d 582 (1964).

Judge Must Explain Law as It Relates to Testimony.—

In accord with original. See Glenn v. Raleigh, 246 N. C. 469, 98 S. E. (2d) 913 (1957).

Implicit in the mearing of this statute is the requirement that the judge must declare and explain the law as it relates to the various aspects of the evidence offered bearing on all substantive phases of the case. Citizens Nat. Bank v. Phillips, 236 N. C. 470, 73 S. E. (2d) 323 (1952); Harris v. Atlantic Greyhound Corp., 243 N. C. 346, 90 S. E. (2d) 710 (1956); Am-

mons v. North American Accident Ins. Co., 245 N. C. 655, 97 S. E. (2d) 251 (1957).

This section requires the presiding judge to declare and explain the law as it relates to the different aspects of the evidence on each side of the case, so as to bring into focus the relations between the different phases of the evidence and the applicable principles of law. State v. Washington, 234 N. C. 531, 67 S. E. (2d) 498 (1951).

This section requires the trial judge, when instructing the jury, to relate and apply the law to the variant factual situations having support in the evidence. Correll v. Gaskins, 263 N.C. 212, 139 S.E.2d 202 (1964).

Where the court in charging the jury with reference to issues of negligence stated the principles of law in general terms and thereafter merely stated to the jury some of the testimony and some of the contentions of the parties and failed and neglected to state to the jury the application of the principles of law as to the facts arising from the evidence or any of the several possible findings of fact by the jury, it thereby failed to declare and explain the law arising on the evidence given in the case as required by this section. Brooks v. Honeycutt, 250 N. C. 179, 108 S. E. (2d) 457 (1959).

And Must Declare and Explain Statutory as Well as Common Law.—The positive duty of the judge, required by this section, to declare and explain the law arising upon the evidence in the case means that he shall declare and explain the statutory law as well as the common law arising thereon. Pittman v. Swanson, 255 N. C. 681, 122 S. E. (2d) 814 (1961); Greene v. Harmon, 260 N.C. 344, 132 S.E.2d 683 (1963); Correll v. Gaskins, 263 N.C. 212, 139 S.E.2d 202 (1964).

The failure to give an instruction applying the statutory law to the evidence constitutes prejudicial error for which defendant is entitled to a new trial. Correll v. Gaskins, 263 N.C. 212, 139 S.E.2d 202 (1964).

A bare declaration of the law in general terms and a statement of the contentions of the parties are not sufficient to meet the statutory requirement. Bulluck v. Long, 256 N. C. 577, 124 S. E. (2d) 716 (1962).

It is error to give the jury carte blanche to speculate and apply to the case their individual notions as to what might constitute negligence in any other way which the court might not have specifically mentioned. Modern Electric Co., Inc. v. Dennis, 259 N. C. 354, 130 S. E. (2d) 547 (1963).

An instruction about a material matter not based on sufficient evidence is erroneous. McGinnis v. Robinson, 252 N. C. 574, 114 S. E. (2d) 365 (1960).

Charge of Breach of Law or Duty Must Be Supported by Allegation and Proof.—Before a breach of a particular law or duty may be submitted for jury determination, there must be both allegation and proof of such breach. Sugg v. Baker, 258 N. C. 333, 128 S. E. (2d) 595 (1962).

The court is not justified in giving instructions with respect to a principle of law, not applicable to the evidence, merely because a breach of such law has been pleaded. Sugg v. Baker, 258 N. C. 333, 128 S. E. (2d) 595 (1962).

The court need not read a statute, etc.—In accord with original. See Kennedy v. James, 252 N. C. 434, 113 S. E. (2d) 889 (1960).

The court is not required to read a statute to the jury; a simple explanation of the law is generally preferable. Therrell v. Freeman, 256 N. C. 552, 124 S. E. (2d) 522 (1962).

And It Is Not Sufficient for the Court Merely to Read a Statute, etc.—Ordinarily, and except in cases of manifest factual simplicity, the rule is that it is not sufficient for the court merely to read a highway safety statute and leave the jury unaided to apply the law to the facts. Citizens Nat. Bank v. Phillips, 236 N. C. 470, 73 S. E. (2d) 323 (1952).

It is not sufficient for the court to read a statute or to state the applicable law bearing on an issue in controversy, and leave the jury unaided to apply the law to the facts. Brannon v. Ellis, 240 N. C. 81, 81 S. E. (2d) 196 (1954); Sugg v. Baker, 258 N. C. 333, 128 S. E. (2d) 595 (1962); Eastern Carolina Feed & Seed Co., Inc. v. Mann, 258 N. C. 771, 129 S. E. (2d) 488 (1963).

It is not sufficient merely for the court to read a statute bearing on the issue in controversy and leave the jury unaided to apply the law to the facts. State v. Coggin, 263 N.C. 457, 139 S.E.2d 701 (1965).

The evidence was all offered by the plaintiff and was not in dispute. When the court, therefore, charged again as to the laws it was its duty to do more than read from the book. It was its duty to apply the law, as given, to the evidence in the case. Ammons v North American Accident Ins Co., 245 N. C. 655, 97 S. E. (2d) 251 (1957).

If the pertinent law is statutory, a mere reading of the statute without applying the law to the evidence is insufficient. Therrell v. Freeman, 256 N. C. 552, 124 S. E. (2d) 522 (1962).

Ordinarily, the reading of the pertinent statute, without further explanation, is not sufficient. State v. Mundy, 265 N.C. 528, 144 S.E.2d 572 (1965).

Simple Explanation without Technical Language May Be Preferable.—While the court must apply the law to the evidence, this is often better accomplished by a simple explanation without the involvement of the technical language of the statute. Pittman v. Swanson, 255 N. C. 681, 122 S. E. (2d) 814 (1961).

But Reading Statute and Pointing Out Material Parts Is Proper.—In a prosecution for conspiracy to defraud the Welfare Department, the act of the court in reading the statute upon which the indictment was based and pointing out the material parts which applied to the charge against the defendants did not amount to a peremptory instruction of guilt, and the instruction was in keeping with the court's duty to declare and explain the law of the case. State v. Butler, 269 N.C. 733, 153 S.E.2d 477 (1967).

Judge Not Relieved of Duty by Remarks of Solicitor.—The solicitor's statement at the beginning of the trial that he would ask for a verdict of guilty of rape with a recommendation of life imprisonment, or guilty of an attempt to commit rape, did not relieve the court of its mandatory duty under this section to declare and explain to the jury the law arising on the evidence given in the case. State v. Green, 246 N. C. 717, 100 S. E. (2d) 52 (1957).

When Party Must Request, etc.—

In accord with 2nd paragraph in original. See Barnes v. Caulbourne, 240 N. C. 721, 83 S. E. (2d) 898 (1954).

Where defendant relies in large measure upon what he contends are circumstances of acute emergency, the failure to comply with this section by applying the applicable legal principles to defendant's evidence in regard thereto must be regarded as prejudicial. Williamson v. Clay, 243 N. C. 337, 90 S. E. (2d) 727 (1956).

Waiver of Recapitulation of Evidence Does Not Relieve Court of Duty to Explain Law.—Though the parties waive a recapitulation of the evidence by the court, such waiver does not relieve the court of the duty to declare and explain the law arising on the evidence of the respective parties. Brannon v Ellis, 240 N. C. 81, 81 S. E. (2d) 196 (1954).

Judge Must Instruct as to Burden of Proof.—This section places a duty upon the presiding judge to instruct the jury as to the burden of proof upon each issue arising upon the pleadings. And it is error for him to discuss the facts and give the contentions of the parties without any reference to the burden of proof. Tippite v. Atlantic Coast Line R. Co., 234 N. C. 641, 68 S. E. (2d) 285 (1951).

This section requires that the judge "shall declare and explain the law arising on the evidence given in the case," which places a duty upon the presiding judge to instruct the jury as to the burden of proof upon each issue arising upon the pleadings. Watt v. Crews, 261 N.C. 143, 134 S.E.2d 199 (1964).

The burden of proof is a substantial right, and the failure of the charge to properly place the burden of proof is reversible error. Hardee v. York, 262 N.C. 237, 136 S.E.2d 582 (1964).

When the court correctly places the burden of proof and states the proper intensity of the proof required, the court is not required to define the term "greater weight of the evidence" in the absence of a prayer for special instructions. Hardee v. York, 262 N.C. 237, 136 S.E.2d 582 (1964).

Instruction Presenting Erroneous View of Law or Incorrect Application Thereof.—It is the duty of the trial court to explain and apply the law to the substantive phases of the evidence adduced, and an instruction which presents an erroneous view of the law or an incorrect application thereof, even though given in stating the contentions of the parties, is error, the rule being that while ordinarily the misstatement of a contention must be brought to the trial court's attention in apt time, this is not necessary when the statement of the contention presents an erroneous view of the law or an incorrect application of it. Blanton v. Carolina Dairy, Inc., 238 N. C. 382, 77 S. E. (2d) 922 (1953); Harris v. White Constr. Co., 240 N C. 556, 82 S. E. (2d) 689 (1954); Lookabill v. Regan, 245 N. C. 500, 96 S. E. (2d) 421 (1957).

An instruction which presents an erroneous view of the law upon a substantive phase of the case is prejudicial error. White v. Phelps, 260 N.C. 445, 132 S.E.2d 902 (1963); Parker v. Bruce, 258 N.C. 341, 128 S.E.2d 561 (1962).

Correcting Erroneous Instruction.—Where a judge has erroneously instructed the jury, he undoubtedly has the right, in fact, it is his duty, when the error is called to his attention, to correct it

by accurately informing the jury what the law is. If the subsequent instruction is sufficient to clearly point to the error previously committed and state the law in such manner that the jury cannot be under any misapprehension as to what the law is, the error previously committed will not warrant a new trial. Griffin v. Pancoast, 257 N. C. 52, 125 S. E. (2d) 310 (1962).

Where Failure to Charge Eliminates Substantial Part of Defense. — Where the plaintiff contended that there was a wrongful seizure of tobacco before defendant's liens were due, and defendant contended that by virtue of § 44-63 the liens were due and collectible since the crop was not being tended, the failure of the trial court to charge the provision of such section was prejudicial, since by such failure the trial court eliminated a substantial part of defendant's defense. McNeill v. McDougald, 242 N. C. 255, 87 S. E. (2d) 502 (1955).

C. Illustrative Cases.

Negligence and Proximate Cause.—The following charge did not comply with the requirement of this section since it placed upon the jury the duty imposed on the judge: "If you find from the evidence and by its greater weight that the death of plaintiff's intestate was proximately caused by the negligence of the defendant as alleged in the complaint, applying these rules of law to the facts in the case, then it would be your duty to answer this issue 'Yes.' If you fail to so find, then it would be your duty to answer it 'No.'" Sugg v. Baker, 258 N. C. 333, 128 S. E. (2d) 595 (1962).

A peremptory instruction to answer the issue in favor of the plaintiff if the jury should find by the greater weight of the evidence that the defendant drove onto the shoulder to his left, and there struck the plaintiff standing on the shoulder, whether he saw or should have seen the plaintiff or not, with no explanation whatever of the meaning of negligence or of proximate cause, does not satisfy the requirement of this section. Jackson v. McBride, 270 N.C. 367, 154 S.E.2d 468 (1967).

Contributory Negligence.—

A charge on the issue of contributory negligence which merely gives the contentions of the parties, without defining contributory negligence and without explaining the law applicable to the facts in evidence, constitutes prejudicial error. Therrell v. Freeman, 256 N. C. 552, 124 S. E. (2d) 522 (1962).

Instructions which tend to bolster the witnesses for the state, and to impair the effect of defendant's plea of not guilty, are violative of this section. State v. Shinn, 234 N. C. 397, 67 S. E. (2d) 270 (1951).

Where court did not state rule for admeasurement of damages, a new trial was granted. Adams v. Beaty Service Co., 237 N. C. 136, 74 S. E. (2d) 332 (1953).

Intersections of Streets and Making Left Turn.—When the failure to explain the law so the jury could apply it to the facts is specifically called to the court's attention by a juror's request for information, it should tell the jury how to find the intersection of the streets as fixed by § 20-38 and how, when the motorist reaches the intersection, he is required to drive in making a left turn. Pearsall v. Duke Power Co., 258 N. C. 639, 129 S. E. (2d) 217 (1963).

Duty of Driver of Overtaking Vehicle. —Where the uncontroverted evidence supports a finding that the driver of the defendant's car violated § 20-149 (a) as to the duty of the driver of an overtaking vehicle, but there is neither allegation nor evidence that such violation was a proximate cause of the collision, an instruction based on § 20-149 (a) is erroneous and prejudicial. McGinnis v. Robinson, 252 N. C. 574, 114 S. E. (2d) 365 (1960).

Maximum Speed in Business District.— Where there was no evidence that the scene of an accident was within a business district as defined in § 20-38, a charge as to the maximum speed in a business district was prejudicial error since charge was on an abstract principle of law not supported by any evidence. Parlier v. Barnes, 260 N.C. 341, 132 S.E.2d 684 (1963).

Negligence in Regard to Turn Signals and Excessive Speed.—Where there is no evidence that defendant driver failed to give the signal for a left turn, as required by § 20-154, and no evidence that she was traveling at excessive speed at the time, it is error for the court to instruct the jury upon the issue of the driver's negligence in regard to turn signals and excessive speed. Textile Motor Freight, Inc. v. DuBose, 260 N.C. 497, 133 S.E.2d 129 (1963).

Failure to Instruct as to Duty of Motorist to Avoid Injuring Children.—See Hawkins v. Simpson, 237 N. C. 155, 74 S. E. (2d) 331 (1953).

Failure to State That Intentional Killing Must Be Shown to Raise Implication of Malice.—See State v. Bright, 237 N. C. 475, 75 S. E. (2d) 407 (1953).

Necessity of Proving Prerequisite Evidential Fact beyond Reasonable Doubt.—Where proof of a particular evidential fact beyond a reasonable doubt is obviously a prerequisite to the establishment of the defendant's guilt, if the circumstantial evidence in its entirety is deemed sufficient to withstand a defendant's motion for judgment as in case of nonsuit, an application of the law to the facts arising on the evidence as provided in this section requires that the presiding judge instruct the jury that proof of such fact beyond a reasonable doubt is a prerequisite to a verdict of guilty. State v. Chavis, 270 N.C. 306, 154 S.E.2d 340 (1967).

Failure to Define Words "Reasonable" and "Doubt." — Where no request was made to define the term "reasonable doubt," the failure to define the words "reasonable" and "doubt" does no violence to this section. State v. Lee, 248 N. C. 327, 103 S. E. (2d) 295 (1958); State v. Broome, 268 N.C. 298, 150 S.E.2d 416 (1966).

Failure to Instruct on Law Applicable to Evidence Offered in Support of Defense.—See State v. Sherian, 234 N. C. 30, 65 S. E. (2d) 331 (1951).

In a prosecution for assault, where defendant's evidence tends to show that the shooting was accidental or by misadventure caused by a tussel over the pistol which the prosecuting witness had pointed at him, defendant has a substantial legal right to have the judge declare and explain the law arising on this evidence, and failure of the court to do so is prejudicial error. State v. Floyd, 241 N. C. 298, 84 S. E. (2d) 915 (1954).

Self-Defense.—Instruction omitting reference to self-defense held prejudicial error. See State v. Messimer, 237 N. C. 617, 75 S. E. (2d) 540, 884 (1953).

Instruction on law of self-defense held not required under evidence. See State v. Porter, 238 N. C. 735, 78 S. E. (2d) 910 (1953).

In a prosecution for murder it was held that it was incumbent upon the trial court, even in the absence of prayer for special instructions, to define a home within the meaning of the law or self-defense and to charge upon defendant's legal right to defend himself in his home, to defend his home from attack and to eject trespassers therefrom, as substantive features of the case arising upon the evidence. State v. Poplin, 238 N. C. 728, 78 S. E. (2d) 777 (1953).

Force Used in Defense of Home—Eviction of Trespassers.—

In accord with original. See State v. Goodson, 235 N. C. 177, 69 S. E. (2d) 242 (1952).

Rights of Person on Whom Murderous Assault Is Made.—In a murder prosecution, where self-defense is relied upon, the failure of the trial court to instruct the jury in accordance with a settled principle of law, under which are fixed the rights of a person upon whom a murderous assault is made, undoubtedly weighed heavily against the defendant and constituted error. State v. Washington, 234 N. C. 531, 67 S. E. (2d) 498 (1951)

Specific Intent in Robbery.—

Where the evidence relied on by defendant tends to admit the taking but to deny that it was with felonious intent, it is essential that the court fully define the "felonious intent" contended for by the State and also explain defendant's theory as to the intent and purpose of the taking, in order that the jury may understandingly decide between the contentions of the State and defendant on that point. State v. Spratt, 265 N.C. 524, 144 S.E.2d 569 (1965).

Failure to Define "Annoy, Molest and Harass".—The words, "annoy, molest and harass," appearing in § 14-196.1, are in such general usage and so well understood by the average person that it would be a waste of time to define them. Had the defendant thought their definition of sufficient importance to request it, it is quite likely that the court would have defined them, but the failure to make such request waives any possible error. State v. Godwin, 267 N.C. 216, 147 S.E.2d 890 (1966).

Section Complied with.—

See Hodges v. Malone & Co., 235 N. C. 512, 70 S. E. (2d) 478 (1952); State v. Roman, 235 N. C. 627, 70 S. E. (2d) 857 (1952); State v. Smith, 237 N. C. 1, 74 S. E. (2d) 291 (1953).

Section Not Complied with.—See Childress v. Johnson Motor Lines, 235 N. C. 522, 70 S. E. (2d) 558 (1952); Spencer v. McDowell Motor Co., 236 N. C. 239, 72 S. E. (2d) 598 (1952); State v. King, 256 N. C. 236, 123 S. E. (2d) 486 (1962); Widenhouse v. Yow, 258 N. C. 599, 129 S. E. (2d) 306 (1963).

§ 1-180.1. Judge not to comment on verdict. — The presiding judge shall make no comment in open court in the presence or hearing of all, or any member or members, of the panel of jurors drawn or summoned for jury duty at

any term of court, upon any verdict rendered at such term of court; and if any presiding judge shall make any comment as herein prohibited, or shall praise or criticise any jury on account of its verdict, whether such comment, praise or criticism be made inadvertently or intentionally, such praise, criticism or comment by the judge shall constitute valid grounds as a matter of right, for the continuance for the term of any action remaining to be tried during that week at such term of court, upon motion of any party to any such action, plaintiff or defendant, or upon motion of the solicitor for the State. The provisions of this section shall not be applicable upon the hearing of motions for a new trial, motions to set aside the verdict of a jury, or a motion made in arrest of judgment. (1955, c. 200.)

§ 1-181. Requests for special instructions.

Section Mandatory.—

Where counsel's request that the judge define "reasonable doubt"was not in writing and was first made after the court had concluded its charge to the jury, whether to comply with the request was a matter resting in the sound discretion of the judge. State v. Broome, 268 N.C. 298, 150 S.E.2d 416 (1966).

Cited in Wagner v. Eudy, 257 N. C. 199, 125 S. E. (2d) 598 (1962).

§ 1-181.1. View by jury.—The judge presiding at the trial of any action or proceeding involving the exercise of the right of eminent domain, or the condemnation of real property may, in his discretion, permit the jury to view the property which is the subject of condemnation. (1965, c. 138.)

§ 1-182. Instructions in writing; when to be taken to jury room.

Cited in Wagner v. Eudy, 257 N. C. 199, 125 S. E. (2d) 598 (1962).

§ 1-183. Motion for nonsuit.

Purpose of Section.—This section, first enacted in 1897, was designed to permit more extensive use of a demurrer to the evidence by permitting the court to consider all of the evidence and if, upon all the evidence, it appeared that plaintiff was not entitled to recover, the court could then allow the motion to nonsuit. Jenkins v. Fowler, 247 N. C. 111, 100 S. E. (2d) 234 (1957).

Criminal Cases.—

This section is the statute in this jurisdiction setting forth the procedure to make a motion for judgment of compulsory nonsuit in civil actions and § 15-173 is the statute in this jurisdiction setting forth the procedure to make a motion for judgment of compulsory nonsuit in criminal actions. Jenkins v. Hawthorne, 269 N.C. 672, 153 S.E.2d 339 (1967).

The power of the court to grant an involuntary nonsuit is altogether statutory and must be exercised in accord with this section. Ward v Cruse, 234 N. C. 388, 67 S. E. (2d) 257 (1951); Warren v. Winfrey, 244 N. C. 521, 94 S. E. (2d) 481 (1956); Jenkins v. Hawthorne, 269 N.C. 672, 153 S.E.2d 339 (1967); Bittle v. Jarrell, 270 N.C. 266, 154 S.E.2d 43 (1967).

The court has no power to enter judgment as of nonsuit before plaintiff has rested his case. Warren v. Winfrey, 244 N. C. 521, 94 S. E. (2d) 481 (1956).

Voluntary Nonsuit Is a Matter of Right.—A plaintiff, in an ordinary civil action, against whom no counterclaim is asserted and no affirmative relief is demanded, may as a matter of right, take a voluntary nonsuit and get out of court at any time before verdict, and his action in so doing is not reviewable, and it is error for the court to refuse to permit him to take the voluntary nonsuit. Southeastern Fire Ins. Co. v. Walton, 256 N. C. 345, 123 S. E. (2d) 780 (1962).

And Is Not Subject to Review.—A voluntary nonsuit is the act of the party and is not subject to review. Southeastern Fire Ins. Co. v. Walton, 256 N. C. 345, 123 S. E. (2d) 780 (1962).

When Plaintiff May Submit to Nonsuit and Appeal.—Where a judge intimates an opinion adverse to the plaintiff on the law upon which his case is based or excludes evidence material and necessary to prove his case, he may submit to a nonsuit and appeal. Pickelsimer v. Pickelsimer, 257 N. C. 696, 127 S. E. (2d) 557 (1962).

Entry of Voluntary Nonsuit Tantamount to Abandonment of Appeal.—Where an appeal is taken from an order sustaining a demurrer on the ground that the

complaint does not state a cause of action, the appellant may abandon his appeal; and a nonsuit entered by the clerk of the superior court, at appellant's request, is tantamount to an abandonment of the appeal. Williams v. Asheville Contracting Co., 257 N. C. 769, 127 S. E. (2d) 554 (1962).

Plaintiff May Institute New Action after Nonsuit.—Where the insufficiency of plaintiff's evidence is the ground on which the court sustains a demurrer to the evidence and enters a judgment of involuntary nonsuit, the plaintiff is permitted to institute a new action and therein offer additional evidence to overcome such deficiency. Walker v. Story, 256 N. C. 453, 124 S. E. (2d) 113 (1962).

Judgment of involuntary nonsuit for material variance between allegata and probata does not preclude plaintiff from instituting a new action. Hall v. Poteat, 257 N. C. 458, 125 S. E. (2d) 924 (1962).

An order overruling demurrer does not preclude motion for judgment as in case of nonsuit upon the trial, since the demurrer tests the sufficiency of the pleadings, while the motion to nonsuit tests the sufficiency of the evidence. Lewis v. Shaver, 236 N. C. 510, 73 S. E. (2d) 320 (1952).

Time to Make Motion to Nonsuit.—Where the trial court did not, in the exercise of its discretion, treat the defendant's motion for nonsuit as having been made at the close of the evidence, the defendant's motion later made did not serve to raise the question of governmental immunity as a defense. Glenn v. Raleigh, 248 N. C. 378, 103 S. E. (2d) 482 (1958).

The power of the court to grant a motion for judgment of compulsory nonsuit is altogether statutory, and when defendant's motion for nonsuit made at the close of her evidence is not renewed after rebuttal evidence is offered by both parties, neither the correctness of the denial of nonsuit nor the sufficiency of plaintiff's evidence to carry the case to the jury is presented on appeal. Jenkins v. Hawthorne, 269 N.C. 672, 153 S.E.2d 339 (1967).

Motion May Be Made for First Time at Conclusion of All Evidence.—It is now the law under the 1951 rewriting of this section that a motion for judgment of nonsuit may be made at the conclusion of all the evidence, irrespective of whether or not such a motion was made theretofore. If the motion is refused, and after the jury has rendered its verdict, the defendant on appeal can urge as ground for reversal the denial of his motion. Whitley v. Jones, 238 N. C. 332, 78 S. E. (2d) 147 (1953).

The only motion for judgment of nonsuit to be considered is that made at the close of all the evidence. Drum v. Bisaner, 252 N. C. 305, 113 S. E. (2d) 560 (1960); Clifton v. Turner, 257 N. C. 92, 125 S. E. (2d) 339 (1962); Rosser v. Smith, 260 N.C. 647, 133 S.E.2d 499 (1963).

Where evidence was offered by plaintiff and both defendants, the only motion for judgment of nonsuit to be considered was that made at the close of all the evidence. King v. Powell, 252 N. C. 506, 114 S. E. (2d) 265 (1960).

Where defendant introduces evidence, only the motion to nonsuit made at the close of all the evidence will be considered. Ammons v. Britt, 256 N. C. 248, 123 S. E (2d) 579 (1962); Widenhouse v. Yow, 258 N. C. 599, 129 S. E. (2d) 306 (1963); Mallet v. Huske, 262 N.C. 177, 136 S.E.2d 553 (1964).

Only Last Motion Considered When Defendant Offers Evidence.—Where defendant has offered evidence, the only motion for judgment of nonsuit to be considered is that made at the close of all the evidence. Belmany v. Overton, 270 N.C. 400, 154 S.E.2d 538 (1967).

Contradictions in plaintiff's evidence, etc.—

In accord with original. See Watt v. Crews, 261 N.C. 143, 134 S.E.2d 199 (1964).

Contradictions and inconsistencies in testimony do not justify nonsuit where the evidence in the light most favorable to complainant makes out a prima facie case. Smith v. Corsat, 260 N. C. 92, 131 S. E. (2d) 894 (1963).

Discrepancies and contradictions, even in plaintiff's evidence, are for the jury and not for the court and do not justify a nonsuit. Nixon v. Nixon, 260 N.C. 251, 132 S.E.2d 590 (1963).

Not Allowed after Verdict.—

While the motion is in fieri until verdict is rendered, the ruling on the motion may not be reversed or entered for the first time, after the issuable facts are determined by the jury. Ward v. Cruse, 234 N. C. 388, 67 S. E. (2d) 257 (1951); Bittle v. Jarrell, 270 N.C. 266, 154 S.E.2d 43 (1967).

A nonsuit is not allowed after verdict. In actions where a verdict passes against the plaintiff, judgment shall be entered against him. Southeastern Fire Ins. Co. v. Walton, 256 N. C. 345, 123 S. E. (2d) 780 (1962).

Where after verdict the judge came to the conclusion that motions for nonsuit should have been allowed, he was then powerless to grant the motion under the rule which forbids dismissal of an action after verdict by judgment as of nonsuit for insufficiency of evidence. Tayloe v. Southern Bell Tel. & Tel. Co., 258 N. C. 766, 129 S. E. (2d) 512 (1963); Bittle v. Jarrell, 270 N.C. 266, 154 S.E.2d 43 (1967).

A nonsuit may not be granted after the jury has returned a verdict, even though the motion was made before the case was submitted to the jury and decision thereon reserved. Bittle v. Jarrell, 270 N.C. 266, 154 S.E.2d 43 (1967).

It is the duty of the court to allow the motion in either of two events: First, when all of the evidence fails to establish a right of action on the part of plaintiff; second, when it affirmatively appears from the evidence as a matter of law that plaintiff is not entitled to recover. Jenkins v. Fowler, 247 N. C. 111, 100 S. E. (2d) 234 (1957).

The judgment of compulsory nonsuit must be sustained if plaintiff's evidence, considered in the light most favorable to him, fails to show any actionable negligence on defendant's part, or if his evidence, considered in the same light affirmatively shows contributory negligence on his part so clearly that no other conclusion can be reasonably drawn therefrom. Ramey v. Southern Ry., 262 N.C. 230, 136 S.E.2d 638 (1964).

How Questions of Law and Fact Presented.—

Inconsistencies and conflicts in the evidence, whether witnesses are mistaken or otherwise, truthful or otherwise, are questions of fact to be resolved by the fact finding body—the jury. Only a question of law is presented by demurrer to the evidence or motion to nonsuit. Barefoot v. Joyner, 270 N.C. 388, 154 S.E.2d 543 (1967).

A motion for judgment of nonsuit under this section is a demurrer to the evidence and presents a question of law, namely, whether the evidence, when considered in the light most favorable to plaintiff, is sufficient to carry the case to the jury and to support a recovery. Walker v. Story, 256 N. C. 453, 124 S. E. (2d) 113 (1962).

Court Does Not Pass on Credibility or Weight of Evidence.—

On a motion to nonsuit the court does not now have any more right to weigh the evidence and pass on the credibility than it possessed prior to the adoption of this section. Jenkins v. Fowler, 247 N C. 111, 100 S. E. (2d) 234 (1957).

All Evidence Is Considered in Light Most Favorable to Plaintiff.—Upon a motion for judgment of nonsuit, in determining its sufficiency for submission to the jury, the evidence, whether offered by plaintiffs or by defendant, must be considered in the light most favorable to plaintiffs. Ammons v. Britt, 256 N. C. 248, 123 S. E. (2d) 579 (1962).

The evidence, whether offered by plaintiffs or defendants, must be taken in the light most favorable to plaintiffs. Tart v. Register, 257 N. C. 161, 125 S. E. (2d) 754 (1962).

In passing on a motion for judgment of involuntary nonsuit the evidence must be considered in the light most favorable to plaintiff, and the court must ignore that which tends to contradict or impeach the evidence presented by plaintiff. Coleman v. Colonial Stores, Inc., 259 N. C. 241, 130 S. E. (2d) 338 (1963); Nance v. Parks, 266 N.C. 206, 146 S.E.2d 24 (1966).

The correctness of a ruling of nonsuit made at the conclusion of the evidence must be determined by an examination of all the evidence viewed in the light most favorable to plaintiffs. Hewett v. Bullard, 258 N. C. 347, 128 S. E. (2d) 411 (1962); Dove v. Lawson, 261 N.C. 516, 135 S.E.2d 216 (1964).

In reviewing the rulings of the trial judge upon a motion for judgment as of nonsuit, the Supreme Court is required to consider the plaintiff's evidence in the light most favorable to him, resolving all conflicts therein in his favor, drawing therefrom all reasonable inferences favorable to him and disregarding all evidence by the defendants tending to show a situation or a course of action contrary to that shown by the plaintiff's evidence so interpreted. Bennett v. Young, 266 N.C. 164, 145 S.E.2d 853 (1966).

In reviewing a judgment of nonsuit the Supreme Court is required to consider the evidence in the light most favorable to the plaintiff, accept the evidence so construed as true, and disregard all evidence in conflict therewith, including any inconsistencies or contradictions in the plaintiff's evidence. Waycaster v. Sparks, 267 N.C. 87, 147 S.E.2d 535 (1966).

In considering whether the court erred in entering a judgment of compulsory nonsuit, plaintiff's evidence is to be taken as true, and its evidence must be considered in the light most favorable to plaintiff, giving it the benefit of every fact and inference of fact reasonably to be drawn therefrom consistent with the allegations of its complaint. Safeguard Ins. Co. v.

Wilmington Cold Storage Co., 267 N.C. 679, 149 S.E.2d 27 (1966).

On a motion for nonsuit the evidence of the plaintiff must be taken as true and considered in the light most favorable to plaintiff. White v. Roach, 261 N.C. 371, 134 S.E.2d 651 (1964); Firemen's Mut. Ins. Co. v. High Point Sprinkler Co., 266 N.C. 134, 146 S.E.2d 53 (1966); Edward v. Hamill, 266 N.C. 304, 145 S.E.2d 884 (1966).

The evidence adduced in the trial below is considered in the light most favorable to the plaintiff, as it must be on a motion for judgment as of nonsuit. Bass v. Roberson, 261 N.C. 125, 134 S.E.2d 157 (1964).

On motion to nonsuit, the evidence must be considered in the light most favorable to plaintiff, giving him the benefit of all reasonable inferences of which it may be susceptible. Davis v. Parnell, 260 N.C. 522, 133 S.E.2d 169 (1963); Stewart v. Gallimore, 265 N.C. 696, 144 S.E.2d 862 (1965).

On motion to nonsuit, plaintiff's evidence will be considered in the light most favorable to him, giving him the benefit of every reasonable inference to be drawn therefrom, and so much of defendant's evidence as is favorable to plaintiff may also be considered. Oxendine v. Lowry, 260 N.C. 709, 133 S.E.2d 687 (1963).

Evidence must be considered in the light most favorable to plaintiff on motion to nonsuit, and discrepancies and contradictions in plaintiff's evidence are for the jury to resolve. Thomas v. Morgan, 262 N.C. 292, 136 S.E.2d 700 (1964).

It is elementary that upon a motion for judgment of nonsuit the evidence introduced by the plaintiff is to be interpreted in the light most favorable to him, all conflicts therein are to be resolved in his favor, all reasonable inferences therefrom which are favorable to him are to be drawn, and the evidence introduced by the defendant is to be considered only insofar as it is favorable to the plaintiff. Lewis v. Barnhill, 267 N.C. 457, 148 S.E.2d 536 (1966).

In passing upon the defendant's motion for judgment as of nonsuit, the court must consider the plaintiff's evidence as true, resolve all conflicts therein in his favor, give him the benefit of all reasonable inferences which may be drawn in his favor, and disregard so much of the defendant's evidence as contradicts that of the plaintiff or tends to show a different state of facts. Simpson v. Lyerly, 265 N.C. 700, 144 S.E.2d 870 (1965).

Upon a motion for judgment of nonsuit the evidence of the plaintiff, together with all reasonable inferences to be drawn therefrom, must be taken to be true and must be interpreted in the light most favorable to the plaintiff. Branch v. Dempsey, 265 N.C. 733, 145 S.E.2d 395 (1965).

Upon the defendants' motions for judgment of nonsuit the plaintiff's evidence is to be interpreted in the light most favorable to him, all reasonable inferences favorable to him must be drawn therefrom, conflicts therein are to be resolved in his favor and evidence of the defendant establishing a different factual situation must be disregarded. Keith v. United Cities Gas Co., 266 N.C. 119, 146 S.E.2d 7 (1966).

In passing upon a motion for judgment of nonsuit, the plaintiff's evidence must be taken to be true, must be interpreted in the light most favorable to the plaintiff, and all reasonable inferences favorable to him must be drawn therefrom. Young v. Baltimore & O.R.R., 266 N.C. 458, 146 S.E.2d 441 (1966); Bowling v. City of Oxford, 267 N.C. 552, 148 S.E.2d 624 (1966).

Plaintiff's evidence must be considered in the light most favorable to plaintiff on a motion for judgment as of nonsuit. Barefoot v. Holmes, 267 N.C. 242, 147 S.E.2d 883 (1966).

In passing upon the motion for judgment of nonsuit, the evidence of the plaintiff must be taken as true and must be interpreted in the light most favorable to the plaintiff. All reasonable inferences favorable to him must be drawn therefrom. Contradictions or inconsistencies, if any, in his evidence must be resolved in his favor. Cox v. Gallamore, 267 N.C. 537, 148 S.E.2d 616 (1966).

On a motion for judgment of compulsory nonsuit, plaintiff's evidence is to be taken as true and considered in the light most favorable to him, giving him the benefit of every fact and inference of fact pertaining to the issues which may be reasonably deduced from the evidence. King v. Bonardi, 267 N.C. 221, 148 S.E.2d 32 (1966).

And All Conflicts Resolved in His Favor.—

All conflicts in the evidence must be resolved in the plaintiff's favor. Coleman v. Colonial Stores, Inc., 259 N. C. 241, 130 S. E. (2d) 338 (1963); Stewart v. Gallimore, 265 N.C. 696, 144 S.E.2d 862 (1965).

Discrepancies, contradictions and inconsistencies in plaintiff's testimony, upon motion for involuntary nonsuit, are resolved in favor of the plaintiff. Redden v. Bynum, 256 N. C. 351, 123 S. E. (2d) 734 (1962).

In considering a motion for judgment of involuntary nonsuit plaintiff must be given

the benefit of every fact and of every reasonable inference of fact arising from the evidence, and all conflicts therein must be resolved in his favor. Raper v. McCrory-McLellan Corp., 259 N. C. 199, 130 S. E. (2d) 281 (1963).

Plaintiff's Evidence Is Taken as True.—In accord with 1st paragraph in original. See Polansky v. Millers' Mut. Fire Ins. Ass'n, 238 N. C. 427, 78 S. E. (2d) 213 (1953); Firemen's Mut. Ins. Co. v. High Point Sprinkler Co., 266 N.C. 134, 146 S.E.2d 53 (1966).

Limitation on Rule That Plaintiff's Evidence Be Taken as True.—The rule that, in passing upon a motion for judgment of nonsuit, the plaintiff's evidence must be taken to be true does not extend to an opinion by a witness, not present at the event, to the effect that a condition existed which is contrary to scientific truth so well established that the court will take judicial notice of it. Keith v. United Cities Gas Co., 266 N.C. 119, 146 S.E.2d 7 (1966).

Plaintiff Entitled to Benefit of Inferences.—

In accord with 1st paragraph in original. See Singletary v. Nixon, 239 N. C. 634, 80 S. E. (2d) 676 (1954); Brady v. Nehi Beverage Co., 242 N. C. 32, 86 S. E. (2d) 901 (1955); Powers v. Robeson County Memorial Hospital, Inc., 242 N. C. 290, 87 S. E. (2d) 510 (1955); Rickman Mfg. Co. v. Gable, 246 N. C. 1, 97 S. E. (2d) 672 (1957); Chambers v. Edney, 247 N. C. 165, 100 S. E. (2d) 343 (1957); Lane v. Dorney, 250 N. C. 15, 108 S. E. (2d) 55 (1959); Williamson v. Bennett, 251 N. C. 498, 112 S. E. (2d) 48 (1960); McCombs v. McLean Trucking Co., 252 N. C. 699, 11 S. E. (2d) 683 (1960); Dixon v. Lilly, 257 N. C. 228, 125 S. E. (2d) 426 (1962); Nixon v. Nixon, 260 N.C. 251, 132 S.E.2d 590 (1963).

In accord with 2nd paragraph in original. See Peele v. Hartsell, 258 N. C. 680, 129 S. E. (2d) 97 (1963); Wilder v. Harris, 266 N.C. 82, 145 S.E.2d 393 (1965).

In passing on a motion for judgment of involuntary nonsuit, plaintiff is entitled to have his evidence taken in the light most favorable to him and to the benefit of every reasonable inference to be drawn therefrom, and to have considered so much of defendant's evidence, if any, as is favorable to him or which tends to explain or make clear that which has been offered by him, and so much of defendant's evidence as tends to establish a different state of facts or which tends to contradict or impeach plaintiff's evidence is to be disregarded. Rosser v. Smith, 260 N.C. 647, 133 S.E.2d 499 (1963).

In passing upon the defendant's motion for a judgment of nonsuit, the plaintiff's evidence must be taken to be true, conflicts therein must be resolved in his favor, all reasonable inferences which can be drawn therefrom favorable to him must be drawn, and no consideration can be given to the defendant's evidence tending to contradict or impeach the plaintiff or to show the existence of a different state of facts. Martin v. Underhill, 265 N.C. 669, 144 S.E.2d 872 (1965).

Evidence Erroneously Excluded Is to Be Considered.—In passing on an appeal from a judgment of compulsory nonsuit, evidence erroneously excluded is to be considered with other evidence offered by plaintiff. Norburn v. Mackie, 262 N.C. 16, 136 S.E.2d 279 (1964).

Discrepancies and contradictions in plaintiff's evidence do not justify a nonsuit, because they are for the jury to resolve. King v. Bonardi, 267 N.C. 221, 148 S.E.2d 32 (1966).

Evidence Erroneously Admitted.—Evidence erroneously admitted will nevertheless be considered on appeal in passing upon the sufficiency of plaintiff's evidence to withstand nonsuit, since the admission of such evidence may have caused plaintiffs to omit evidence of the same import. McDaris v. Breit Bar "T" Corp., 265 N.C. 298, 144 S.E.2d 59 (1965).

Notwithstanding the incompetency of the testimony admitted at trial, it must be considered on the motion for nonsuit. McDaris v. Breit Bar "T" Corp., 265 N.C. 298, 144 S.E.2d 59 (1965).

All relevant evidence admitted by the trial court, whether competent or not, must be accorded its full probative force in determining the correctness of its ruling upon a motion for judgment as of nonsuit. Dixon v. Edwards, 265 N.C. 470, 144 S.E.2d 408 (1965).

Upon a motion for judgment of nonsuit all evidence favorable to the plaintiff, including evidence improperly admitted, must be considered. Keith v. United Cities Gas Co., 266 N.C. 119, 146 S.E.2d 7 (1966).

Consideration of Defendant's Evidence.—In accord with 1st paragraph in original. See Rice v. Lumberton, 235 N. C. 227, 69 S. E. (2d) 543 (1952); Williams v. Robertson, 235 N. C. 478, 70 S. E. (2d) 692 (1952); Brady v. Nehi Beverage Co., 242 N. C. 32, 86 S. E. (2d) 901 (1955); McCombs v. McLean Trucking Co., 252 N. C. 699, 114 S. E. (2d) 683 (1960).

In accord with 3rd paragraph in original. See Bell v Maxwell, 246 N. C. 257, 98 S. E. (2d) 33 (1957); Keener v. Beal, 246 N. C. 247, 98 S. E. (2d) 19 (1957).

On motion to nonsuit, plaintiff's evidence, and so much of defendant's evidence as explains and makes clear that offered by plaintiff, will be considered in the light most favorable to plaintiff. Welling v. Charlotte, 241 N. C. 312, 85 S. E. (2d) 379 (1955).

Where the defendant introduces evidence, this section requires, on motion to nonsuit, a consideration of all the evidence. Eason v. Grimsley, 255 N. C. 494, 121 S. E. (2d) 885 (1961).

The question of nonsuit must be answered upon a consideration of all the evidence which tends to support plaintiff's case. Tayloe v. Southern Bell Tel. & Tel. Co., 258 N. C. 766, 129 S. E. (2d) 512 (1963).

Only that part of defendant's evidence which is favorable to plaintiff can be considered, since otherwise the court would have to pass upon the weight and credibility of the evidence. Eason v. Grimsley, 255 N. C. 494, 121 S. E. (2d) 885 (1961).

Upon a motion for judgment of nonsuit the Supreme Court may consider evidence offered by defendant that tends to clarify or explain evidence offered by plaintiff not inconsistent therewith, but it must ignore that which tends to establish another and different state of facts or which tends to contradict or impeach the testimony presented by plaintiff. Otherwise, consideration would not be in the light most favorable to plaintiff. Ammons v. Britt, 256 N. C. 248, 123 S. E. (2d) 579 (1962).

Upon a motion for judgment as of nonsuit, the evidence offered by the plaintiff, together with those portions, if any, of the defendants' evidence which are favorable to the plaintiff, must be considered in the light most favorable to the plaintiff and the exclusion of all evidence by the defendants which tends to establish a different state of facts or to contradict or impeach the testimony presented by the plaintiff. Dixon v. Edwards, 265 N.C. 470, 144 S.E.2d 408 (1965).

Upon defendant driver's motion for nonsuit his statement to a police officer must be deemed true and all reasonable inferences therefrom favorable to the plaintiff must be drawn. Branch v. Dempsey, 265 N.C. 733, 745 S.E.2d 395 (1965).

In ruling upon a motion for a compulsory judgment of nonsuit, after all the evidence of plaintiff and defendant is in, the court may consider so much of defendant's evidence as is favorable to plaintiff or tends to clarify or explain evidence offered by plaintiff not inconsistent therewith, but it must ignore that which tends to establish another and different state of facts or which tends to contradict or impeach the testimony presented by plaintiff. Otherwise, consideration would not be in the light most favorable to plaintiff. Morgan v. Great Atl. & Pac. Tea Co., 266 N.C. 221, 145 S.E.2d 877 (1966).

Evidence offered by defendant that tends to support plaintiff's allegations is to be considered in passing upon a motion for judgment of nonsuit. Faison v. T & S Trucking Co., 266 N.C. 383, 146 S.E.2d 450 (1966).

On a motion for judgment of compulsory nonsuit, defendant's evidence which tends to impeach or contradict plaintiff's evidence is not to be considered. King v. Bonardi, 267 N.C. 221, 148 S.E.2d 32 (1966).

Defendant's evidence that tends to establish another and different state of facts from the evidence offered by plaintiff, or tends to contradict or impeach the evidence presented by plaintiff, must be ignored in ruling upon appellant's motion for judgment of compulsory nonsuit. King v. Bonardi, 267 N.C. 221, 148 S.E.2d 32 (1966).

The court will consider only the evidence, etc.—

In accord with 1st paragraph in original. See Murray v. Wyatt, 245 N. C. 123, 95 S. E. (2d) 541 (1956).

Plaintiff's Evidence Considered in Light of His Allegations. — On a motion for judgment of compulsory nonsuit, plaintiff's evidence must be considered in the light of his allegations to the extent the evidence is supported by the allegations. King v. Bonardi, 267 N.C. 221, 148 S.E.2d 32 (1966).

Sufficiency of the evidence to overrule nonsuit must be considered in the context of plaintiff's allegations. Clemmons v. Nationwide Mut. Ins. Co., 267 N.C. 495, 148 S.E.2d 640 1966).

Where there is a material variance between allegation and proof, such defect may be taken advantage of by motion for judgment as of nonsuit. Brady v. Nehi Beverage Co., 242 N. C. 32, 86 S. E. (2d) 901 (1955).

Nonsuit is proper where there is a material variance between the allegation and proof. Noland v. Brown, 258 N. C. 778, 129 S. E. (2d) 477 (1963).

Judgment of nonsuit is proper when there is a fatal variance between a plaintiff's allegata and probata. Proof without

allegation is no better than allegation without proof. A plaintiff must make out his case secundum allegata. He cannot recover except on the case made by his pleading. Hall v. Poteat, 256 N. C. 458, 125 S. E. (2d) 924 (1962).

Passing on Motion for Nonsuit as to Defendant's Counterclaim.—In passing upon the plaintiff's motion for judgment of nonsuit as to the defendant's counterclaim, all of the evidence, including that offered by the plaintiff, must be interpreted in the light most favorable to the defendant, since, as to the counterclaim, the defendant is in the position of a plaintiff seeking relief. Robinette v. Wike, 265 N.C. 551, 144 S.E.2d 594 (1965).

In passing upon whether the court should have nonsuited a counterclaim, the evidence must be considered in the light most favorable to the defendant. Evidence favorable to plaintiff must be disregarded. University Motors, Inc. v. Durham Coca-Cola Bottling Co., 266 N.C. 251, 146 S.E.2d 102 (1966).

In considering the sufficiency of the evidence to withstand plaintiff's motions for judgments of nonsuit as to defendant's counterclaims, the evidence must be considered in the light most favorable to defendant and evidence favorable to plaintiff must be disregarded. Wilkins v. Turlington, 266 N.C. 328, 145 S.E.2d 892 (1966).

Findings of Fact Not Excepted to Are Presumed Supported by Competent Evidence.—Where there are no exceptions to the admission of evidence or to the findings of fact, the findings are presumed to be supported by competent evidence, and an exception to the refusal of defendant's motion for judgment of compulsory nonsuit does not present the question whether the findings are supported by competent evidence. Taney v. Brown, 262 N.C. 438, 137 S.E.2d 827 (1964).

When Motion Should Be Disallowed.—If the evidence does no more than raise a possibility or conjecture of a fact, a motion for a judgment of nonsuit should be allowed, but if the more reasonable probability is in favor of the plaintiffs' contention the question ought to be submitted to the jury. Taylor v. Southern Bell Tel. & Tel. Co., 258 N. C. 766, 129 S. E. (2d) 512 (1963).

The court properly overruled defendant's motion for nonsuit when, considered in the light most favorable to plaintiff, the evidence presented issues of fact for jury determination. Kirkman v. Willard, 259 N. C. 135, 129 S. E. (2d) 895 (1963).

When it is made to appear that there is a bona fide dispute between landowners as to the true location of the boundary line between adjoining tracts of land, the cause may not be dismissed as in case of nonsuit. Rice v. Rice, 259 N. C. 171, 130 S. E. (2d) 41 (1963).

Where evidence was sufficient to support a finding that the proximate cause of death of plaintiff's intestate was negligent conduct on the part of either or both of the defendants, a judgment of nonsuit was error as to each of them. Cox v. Gallamore, 267 N.C. 537, 148 S.E.2d 616 (1966).

If the evidence in the light most favorable to plaintiff, giving him the benefit of all permissible inferences from it, tends to support all essential elements of actionable negligence, then it is sufficient to survive the motion to nonsuit. Barefoot v. Joyner, 270 N.C. 388, 154 S.E.2d 543 (1967).

Waiver.—

Defendant's motion to nonsuit made at the conclusion of plaintiff's evidence is waived by offering evidence. Hollowell v. Archbell, 250 N. C. 716, 110 S. E. (2d) 262 (1959).

Defendant, having introduced evidence after the denial of his motion for nonsuit made at the close of plaintiffs' evidence, waived its exception to the refusal of that motion. Tayloe v. Southern Bell Tel. & Tel. Co., 258 N. C. 766, 129 S. E. (2d) 512 (1963).

Where plaintiff offers evidence for the purpose of defeating defendant's counterclaim, plaintiff waives his motion to nonsuit the counterclaim made at the close of defendant's evidence. Hinshaw v. Joyce, 249 N. C. 218, 105 S. E. (2d) 653 (1958).

Right to press for nonsuit held waived. Goldston Bros. v. Newkirk, 234 N. C. 279, 67 S. E. (2d) 69 (1951).

Same—Introduction of Evidence.—

Where motion to nonsuit is not renewed after the introduction of evidence by defendant, defendant waives the matter. Short v. Central Bus Sales Corp., 259 N. C. 133, 129 S. E. (2d) 887 (1963).

Where defendant offers evidence, the Supreme Court will consider only the ruling on the motion for nonsuit made by defendant at the close of all the evidence. Jones v Siler City Mills, Inc., 250 N. C. 527, 108 S. E. (2d) 917 (1959).

Judgment as of Nonsuit, etc.—

It is not error for the court to enter a judgment as of nonsuit on its own motion when the evidence would justify a directed verdict, a nonsuit and directed verdict having the same legal effect. Nunn v. Smith, 270 N.C. 374, 154 S.E.2d 497 (1967).

When Nonsuit Proper.—

A judgment of nonsuit on the ground of contributory negligence may be rendered only when a single inference leading to that conclusion can reasonably be drawn from the evidence. Morrisette v. A. G. Boone Co., 235 N. C. 162, 69 S. E. (2d) 239 (1952).

Same—In Negligence Cases. — It is proper in negligence cases to sustain a demurrer to the evidence and enter judgment as of nonsuit under the provision of this section when all the evidence, taken in the light most favorable to the plaintiff, fails to show any actionable negligence on the part of defendant and when it clearly appears from the evidence that the injury complained of was independently and proximately produced by the wrongful act, neglect, or default of any outside agency or responsible third person. Mintz v. Murphy, 235 N. C. 304, 69 S. E. (2d) 849 (1952); Godwin v. Nixon, 236 N. C. 632, 74 S. E. (2d) 24 (1953).

Ordinarily, when a child suddenly runs into the street from behind a parked vehicle or other obstruction, thereby preventing the child from being seen in time to have avoided the accident, and the driver was not traveling at an excessive rate of speed, nonsuit is proper. Johns v. Day, 257 N. C. 751, 127 S. E. (2d) 543 (1962).

Nonsuit should have been entered on evidence in action to recover for fall on sidewalk. Welling v. Charlotte, 241 N. C. 312, 85 S. E. (2d) 379 (1955).

Failure to Establish Negligence of Defendant as Alleged as Grounds for Nonsuit.—See Taylor v. E. B. Garrett Co., 260 N.C. 672, 133 S.E.2d 518 (1963).

A judgment of nonsuit on the ground of intervening negligence of a third person may be granted only when the evidence of the plaintiff permits no conclusion except that such third person was negligent and that his act or omission could not reasonably have been foreseen by the negligent defendant. Young v. Baltimore & O.R.R., 266 N.C. 458, 146 S.E.2d 441 (1966).

Contributory Negligence.—

In accord with 2nd paragraph in original. See Pruett v. Inman, 252 N. C. 520, 114 S. E. (2d) 360 (1960); Smith v. Rawlins, 253 N. C. 67, 116 S. E. (2d) 184 (1960).

A defendant may not avail himself of his plea of contributory negligence by a motion for a compulsory judgment of nonsuit under this section, unless the fact necessary to show contributory negligence are established so clearly by plaintiff's own evidence that no other conclusion can be reasonably drawn therefrom. Rodgers v. Thompson, 256 N. C. 265, 123 S. E (2d) 785 (1962); Short v. Chapman, 261 N.C. 674, 136 S.E.2d 40 (1964); McNamara v. Outlaw, 262 N.C. 612, 138 S.E.2d 287 (1964); Wells v. Johnson, 269 N.C. 192, 152 S.E.2d 229 (1967).

The rule is firmly embedded in the adjective law of this State that a defendant may avail himself of his plea of contributory negligence by a motion for a compulsory judgment of nonsuit under this section when, and only when, the facts necessary to show contributory negligence are established so clearly by plaintiff's own evidence that no other conclusion can be reasonably drawn therefrom. Rouse v. Peterson, 261 N.C. 600, 135 S.E.2d 549 (1964).

The rule is firmly embedded in our adjective law to enter a judgment of nonsuit on the theory of contributory negligence when plaintiff's own evidence, considered in the light most favorable to him, shows negligence on his part proximately contributing to his injury so clearly that no other conclusion can be reasonably drawn therefrom. Ramey v. Southern Ry., 262 N.C. 230, 136 S.E.2d 638 (1964).

A defendant may successfully avail himself of his plea of contributory negligence of plaintiff as a matter of law by a motion for a compulsory judgment of nonsuit if, and only if, the facts necessary to show contributory negligence of plaintiff are established so clearly by his own evidence that no other conclusion can be reasonably drawn therefrom. Robertson v. Ghee, 262 N.C. 584, 138 S.E.2d 220 (1964).

Judgment of involuntary nonsuit on the ground of contributory negligence should be granted when, and only when, the evidence, when taken in the light most favorable to plaintiff, establishes plaintiff's contributory negligence so clearly that no other reasonable inference or conclusion may be drawn therefrom. C. C. Mangum, Inc. v. Gasperson, 262 N.C. 32, 136 S.E.2d 234 (1964).

Involuntary nonsuit on the ground of contributory negligence of the plaintiff may be allowed only when the plaintiff's evidence, considered in the light most favorable to him, establishes his own negligence as a proximate contributing cause of the injury so clearly that no other conclusion reasonably can be drawn therefrom. Beam v. Parham, 263 N.C. 417, 139 S.E.2d 712 (1965).

Nonsuit for contributory negligence is proper only when the evidence, considered in the light most favorable to plaintiff,

establishes contributory negligence so clearly that no other reasonable conclusion may be drawn therefrom. Kirby v. Fulbright, 262 N.C. 144, 136 S.E.2d 652 (1964); Murray v. Coca-Cola Bottling Co., 265 N.C. 334, 144 S.E.2d 1 (1965).

A judgment of involuntary nonsuit on the ground of contributory negligence will not be sustained unless the evidence is so clear on that issue that no other conclusion is reasonably permissible. Allen v. Metcalf, 261 N.C. 570, 135 S.E.2d 540 (1964).

When the defendant pleads contributory negligence, and plaintiff's own evidence, considered in the light most favorable to him, affirmatively shows such contributory negligence on his part so clearly that no other conclusion can be reasonably drawn therefrom, defendant is entitled to have his motion for judgment of compulsory nonsuit sustained. Wallsee v. Carolina Water Co., 265 N.C. 291, 144 S.E.2d 21 (1965).

A nonsuit on the ground of plaintiff's contributory negligence can be granted only when his own evidence shows such negligence by him so clearly that no other reasonable inference can be drawn therefrom. Stewart v. Gallimore, 265 N.C. 696, 144 S.E.2d 862 (1965).

A judgment of nonsuit may not be entered on the ground of the plaintiff's contributory negligence unless the plaintiff's own evidence establishes such negligence by him so clearly as to permit no other reasonable conclusion. Simpson v. Lyerly, 265 N.C. 700, 144 S.E.2d 870 (1965).

A nonsuit may be granted on the ground of the plaintiff's own contributory negligence only when the evidence of the plaintiff admits of no other conclusion. Young v. Baltimore & O.R.R., 266 N.C. 458, 146 S.E.2d 441 (1966).

Nonsuit on the issue of contributory negligence should be denied when opposing inferences are permissible from plaintiff's evidence. King v. Bonardi, 267 N.C. 221, 148 S.E.2d 32 (1966).

The motion for nonsuit may not be allowed on the ground of contributory negligence unless the plaintiff's own evidence establishes such negligence so clearly that no other conclusion can reasonably be drawn therefrom. Lewis v. Barnhill, 267 N.C. 457, 148 S.E.2d 536 (1966).

The court cannot allow a motion for judgment of compulsory nonsuit on the ground of contributory negligence on plaintiff's part in an action for damages for personal injury if it is necessary for the court to rely on any part of the evidence offered by defendant. Wells v. Johnson, 269 N.C. 192, 152 S.E.2d 229 (1967).

A nonsuit on the ground of contributory negligence will be granted only when the plaintiff's evidence establishes the facts necessary to show contributory negligence so clearly that no other conclusion may be reasonably drawn therefrom. White v. Mote, 270 N.C. 544, 155 S.E.2d 75 (1967).

The evidence will be considered in the light most favorable to plaintiff in passing upon the question of whether plaintiff's own evidence discloses contributory negligence as a matter of law. Clark v. Roberts, 263 N.C. 336, 139 S.E.2d 593 (1965).

Plaintiff's contention that defendant was guilty of contributory negligence as a matter of law, thereby barring any recovery by defendant on defendant's counterclaim or cross action, necessitates an appraisal of defendant's evidence in the light most favorable to defendant. Short v. Chapman, 261 N.C. 674, 136 S.E.2d 40 (1964).

On motion to nonsuit, defendant's contention that plaintiff's own evidence shows that he was guilty of contributory negligence as a matter of law necessitates a consideration of plaintiff's evidence in the light most favorable to him. McNamara v. Outlaw, 262 N.C. 612, 138 S.E.2d 287 (1964).

Since the burden of proof on the issue of contributory negligence is upon the defendant, a motion for judgment of involuntary nonsuit upon that ground should be allowed only when the plaintiff's evidence, considered alone and taken in the light most favorable to him, together with all inferences favorable to him which may reasonably be drawn therefrom, so clearly establishes the defense that no other conclusion can reasonably be drawn. Raper v. Byrum, 265 N.C. 269, 144 S.E.2d 38 (1965).

A motion for judgment of compulsory nonsuit upon the ground of contributory negligence should be allowed only when the plaintiff's evidence, considered alone and taken in the light most favorable to him, together with inferences favorable to him which may be reasonably drawn therefrom, so clearly establishes the defense of contributory negligence that no other conclusion can reasonably be drawn. Atwood v. Holland, 267 N.C. 722, 148 S.E.2d 851 (1966).

A judgment of nonsuit on the ground of contributory negligence may be entered only when the plaintiff's evidence, considered alone and taken in the light most favorable to him, so clearly establishes the defense that no other reasonable inference or conclusion can be drawn therefrom. Douglas v. W. C. Mallison & Son, 265 N.C. 362, 144 S.E.2d 138 (1965).

Nonsuit on the ground of contributory negligence should be allowed only when plaintiff's own evidence, taken in the light most favorable to him, so clearly establishes this defense of contributory negligence that no other reasonable inference or conclusion can be drawn therefrom. King v. Bonardi, 267 N.C. 221, 148 S.E.2d 32 (1966).

A compulsory nonsuit on the ground that plaintiff's intestate, an eight-year-old boy, was guilty of legal contributory negligence is not permissible, because of the rebuttable presumption that the eight-year-old boy was incapable of contributory negligence. Ennis v. Dupree, 258 N. C. 141, 128 S. E. (2d) 231 (1962).

Where defendants did not allege, either directly or indirectly, a violation of § 20-149 (a) on the part of plaintiff, the failure of plaintiff to comply with that statute, in the absence of proper allegation, could not be the basis for nonsuit or a jury verdict. Eason v. Grimsley, 255 N. C. 494, 121 S. E. (2d) 885 (1961).

Demurrer to Complaint and Demurrer to Evidence Distinguished.—A demurrer to a complaint, under § 1-127, and a demurrer to the evidence, under this section, are different in purpose and result. One challenges the sufficiency of the pleadings, the other the sufficiency of the evidence. Gantt v. Hobson, 240 N C. 426, 82 S. E. (2d) 384 (1954); Riddle v. Artis, 246 N. C. 629, 99 S. E. (2d) 857 (1957); Cannon v. Parker, 249 N. C. 279, 106 S. E. (2d) 229 (1958).

The words "ore tenus" have no significance in relation to a demurrer to the evidence, i. e., a motion for judgment of nonsuit, under this section. Cannon v. Parker, 249 N. C. 279, 106 S. E. (2d) 229 (1958).

Tests Sufficiency of Evidence. — A motion for a compulsory nonsuit under this section is the proper procedure to test the legal sufficiency of the evidence to carry the case to the jury Bennett v. Southern Ry. Co., 245 N. C. 261, 96 S. E. (2d) 31 (1957).

In an action under the Federal Employers' Liability Act, motion for compulsory nonsuit is the proper procedure to present the question whether the evidence, with all reasonable inferences therefrom, is sufficient to show that defendant was guilty of negligence which constituted a proximate cause or one of the proximate causes of the injury or death. Bennett v. Southern Ry Co., 245 N. C. 261, 96 S. E. (2d) 31 (1957).

Sufficiency of Evidence Determined by Law of Forum.—In an action arising out of a truck collision in another state the question whether the evidence offered was sufficient to carry the case to the jury over defendants' motion for judgment as of nonsuit is to be determined under application of principles of law prevailing in this jurisdiction. McCombs v. McLean Trucking Co., 252 N. C. 699, 114 S. E. (2d) 683 (1960).

Sufficiency of Circumstantial Evidence in Civil Action.—See Jones v. Siler City Mills, Inc., 250 N. C. 527, 108 S. E. (2d) 917 (1959).

Mathematical possibilities and the results of exact measurements, showing minimal space in which observations could be made, should not be controlling factors in determining whether nonsuit should be allowed as a matter of law. Johnson v. Southern Ry. Co., 257 N. C. 712, 127 S. E. (2d) 521 (1962).

An appeal does not lie immediately from the denial of a motion to nonsuit, but movant may note an exception for consideration on appeal from final judgment. Hollingsworth GMC Trucks, Inc. v. Smith, 249 N. C. 764, 107 S. E. (2d) 746 (1959).

A motion for nonsuit in an action for malicious prosecution challenges the validity of the warrant upon which plaintiff was prosecuted. Bassinov v. Finkle, 261 N.C. 109, 134 S.E.2d 130 (1964).

Evidence Sufficient for Jury.—

In determining its sufficiency for submission to the jury, the evidence, whether offered by plaintiff or by the defendants, must be considered in the light most favorable to plaintiff. King v. Powell, 252 N. C. 506, 114 S. E. (2d) 265 (1960).

See also Rice v. Lumberton, 235 N. C. 227, 69 S. E. (2d) 543 (1952); Williams v. Robertson, 235 N. C. 478, 70 S. E. (2d) 692 (1952).

Evidence Insufficient for Jury. — The evidence favorable to plaintiff tended to show that her intestate, a brakeman on a freight train, was ordered, while a violent electrical storm was still in progress, to leave shelter and resume work, and that he was struck and killed by a bolt of lightning while walking beside the tracks in the performance of his duties. The evidence was held insufficient to show negligence on the part of the railroad employer as a concurring proximate cause of the injury and death, and therefore nonsuit was properly entered Bennett v. Southern Ry. Co., 245 N. C. 261, 96 S. E. (2d) 31 (1957).

Refusal of Motion for Nonsuit Held Proper.—See Hodge v McGuire, 235 N. C. 132, 69 S. E. (2d) 227 (1952); Drumwright v. Wood, 266 N.C. 198, 146 S.E.2d 1 (1966); Moore v. New York Life Ins. Co., 266 N.C. 440, 146 S.E.2d 492 (1966).

Refusal of Motion for Nonsuit Held Improper.—See State v. Chaney, 256 N. C. 255, 123 S. E. (2d) 498 (1962); Bingham v. Lee, 266 N.C. 173, 146 S.E.2d 19 (1966).

Applied in Sprinkle v. Reidsville, 235 N. C. 140, 69 S. E. (2d) 179 (1952); Mintz v. Atlantic Coast Line R. Co., 236 N. C. 109, 72 S. E. (2d) 38 (1952); Wilson v. Geigy & Co., 236 N. C. 566, 73 S. E. (2d) 487 (1952); Hawes v. Atlantic Refining Co., 236 N. C. 643, 74 S. E. (2d) 17 (1953); Fidelity Bank of Durham v. Bloomfield, 246 N. C. 492, 98 S. E. (2d) 865 (1957); Spaugh v. Winston-Salem, 249 N. C. 194, 105 S. E. (2d) 610 (1958); Nunn v. Gibbons, 249 N. C. 362, 106 S. E. (2d) 499 (1959); Bridges v. Jackson, 255 N. C. 333, 121 S. E. (2d) 542 (1961); Smith v. State Highway Comm., 257 N. C. 410, 126 S. E. (2d) 87 (1962); Salter v. Lovick, 257 N. C. 619, 127 S. E. (2d) 273 (1962); Queen v. Jarrett, 258 N. C. 405, 128 S. E. (2d) 894 (1963); Ivery v. Ivery, 258 N. C. 721, 129 S. E. (2d) 457 (1963); Marlin v. Moss, 261 N.C. 737, 136 S.E.2d 90 (1964); Smith v. Harris, 261 N.C. 740, 136 S.E.2d 123 (1964); Loomis v. Torrence, 261 N.C. 741, 135 S.E.2d 785 (1964); Leonard v. Baker's Shoe Store, Inc., 261 N.C. 781, 136 S.E.2d 102 (1964); Long v. National Food Stores, Inc., 262 N.C. 57, 136 S.E.2d 275 (1964); Powell v. Cross, 263 N.C. 764, 140 S.E.2d 393 (1965).

Cited in Powell v. Lloyd, 234 N. C. 481, 67 S. E. (2d) 664 (1951) (dis. op.); Jones v. Jones, 235 N. C. 390, 70 S. E. (2d) 13 (1952); Tarlton v. Keith, 250 N. C. 298, 108 S. E. (2d) 621 (1959); Frazier v. Frazier, 250 N. C. 375, 108 S. E. (2d) 665 (1959); Skinner v. Jernigan, 250 N. C. 657, 110 S. E. (2d) 301 (1959); Gamble v. Sears, 252 N. C. 706, 114 S. E. (2d) 677 (1960); Jackson v. Stancil, 253 N. C. 291, 116 S. E. (2d) 817 (1960); Darden v. Bone, 254 N. C. 599, 119 S. E. (2d) 634 (1961).

§ 1-183.1. Effect on counterclaim of nonsuit as to plaintiff's claim. —The granting of a motion by the defendant for judgment of nonsuit as to the plaintiff's cause of action shall not amount to the taking of a voluntary nonsuit on any counterclaim which the defendant was required or permitted to plead pursuant to G. S. 1-137. (1959, c. 77.)

Applied in Williamson v. Varner, 252 N. C. 446, 114 S. E. (2d) 92 (1960).

§ 1-184. Waiver of jury trial.

Sections 1-184 to 1-187 are to be construed in pari materia with § 1-539.3 et seq. Hajoca Corp. v. Brooks, 249 N. C. 10, 105 S. E. (2d) 123 (1958).

Section Supplemented by § 1-539.3 et seq. to Extent of Waiver of Trial by Jury. —See Hajoca Corp. v. Brooks, 249 N. C. 10, 105 S. E. (2d) 123 (1958).

Waiver by Consent to Pay Additur. — While it may be suggested that the practice of additur deprives a defendant of his constitutional right to a jury trial, guaranteed by N. C. Const., art. 1, § 19, the obvious answer is that the defendant can waive that right, which he does when he consents to pay the additur, since in this State the parties to a civil action have a right to waive a jury trial. Caudle v. Swanson, 248 N. C. 249, 103 S. E. (2d) 357 (1958).

A guardian ad litem and his attorney may waive jury trial. Blades v. Spitzer, 252 N. C. 207, 113 S. E. (2d) 315 (1960).

Waiver of a jury trial invests the trial judge with the dual capacity of judge and juror, and it is his duty to weigh the evidence, find the facts, and upon the conflicting inferences of causation of plaintiff's injuries, to draw the inferences; the ultimate issue is for him. Taney v. Brown, 262 N.C. 438, 137 S.E.2d 827 (1964).

Without Waiver Judge Cannot Enter Order Deciding Issue of Fact. — Where there is nothing in the record to indicate that petitioner and respondent have waived their constitutional and statutory right to have the issue of fact joined on the pleadings tried by a jury, and there is no question of reference, the judge had no authority to enter an order affirming the order of the assistant clerk of the superior court, which in effect was a determination by the judge of the issue of fact raised by the pleadings and a finding by him that money deposited in the office of the clerk of the superior court was funds belonging to a decedent and an order that said money be distributed to the administrator c.t.a. of her last will and testament. In the Matter of Wallace, 267 N.C. 204, 147 S.E.2d 922 (1966).

Judge's Findings of Fact Are Conclusive.—

In accord with 1st paragraph in original. See Goldsboro v. Atlantic Coast Line R. Co., 246 N. C. 101, 97 S. E. (2d) 486 (1957); Everette v. D. O. Briggs Lumber Co., 250 N. C. 688, 110 S. E. (2d) 288 (1959).

In accord with 3rd paragraph in original. See Turnage Co. v. Morton, 240 N. C. 94, 81 S. E. (2d) 135 (1954); Reid v. Johnston, 241 N. C. 201, 85 S. E. (2d) 114 (1954).

Upon waiver of jury trial as provided in this section, the court's findings of fact have the force and effect of a verdict by jury. Textile Ins. Co. v. Lambeth, 250 N. C. 1, 108 S. E. (2d) 36 (1959); Sherrill v. Boyce, 265 N.C. 560, 144 S.E.2d 596 (1965).

When the parties to a civil action waive trial by jury, as they may do, and agree that the presiding judge may find the facts in respect to the issues of fact raised by the pleadings, his findings of fact have the force and effect of a verdict by a jury upon the issues involved. And his findings of fact are conclusive on appeal, if there is evidence to support them. State Trust Co. v. M & J Finance Corp., 238 N. C. 478, 78 S. E. (2d) 327 (1953).

Where the parties waive a jury trial and there are no exceptions to the findings of fact by the judge, it will be presumed that they are supported by competent evidence, and are binding on appeal. Tanner v. Ervin, 250 N. C. 602, 109 S. E. (2d) 460 (1959).

He Acts in Dual Capacity of Judge and Jury.—The waiver of trial by jury invests the trial judge with the dual capacity of judge and juror. Hodges v. Hodges, 257 N. C. 774, 127 S. E. (2d) 567 (1962).

It Is His Duty to Consider and Weigh All Competent Evidence.—When trial by jury is waived, it is the trial judge's right and duty to consider and weigh all the competent evidence before him, giving to it such probative value as in his sound discretion and opinion it is entitled to. Hodges v. Hodges, 257 N. C. 774, 127 S. E. (2d) 567 (1962).

And to Determine Its Weight and Credibility and Inferences to Be Drawn Therefrom.—When trial by jury is waived, it is the trial judge's province to determine the credibility of the witnesses and the weight to be attached to their testimony, and the inferences legitimately to be drawn therefrom, in exactly the same sense that a jury should do in the trial of a case. Hodges v. Hodges, 257 N. C. 774, 127 S. E. (2d) 567 (1962).

When a trial by jury is waived, and where different reasonable inferences can be drawn from the evidence, the determination of which reasonable inferences shall be drawn is for the trial judge. Hodges v. Hodges, 257 N. C. 774, 127 S. E. (2d) 567 (1962).

No New Trial if Judgment Shows Findings and Legal Basis.—Where jury trial is waived and the court acts both as judge and jury, it is irregular for the court to render a verdict on issues submitted to itself, but in the absence of objection and exception, a new trial will not be ordered for this cause if from the judgment it can be determined what the court found the ultimate facts to be and what the legal basis of the judgment is. Daniels v. Nationwide Mut. Ins. Co., 258 N. C. 660, 129 S.

Judgment of Nonsuit Without Specific E. (2d) 314 (1963).

Findings of Fact.—Where, upon waiver of jury trial in accordance with this section, the court makes no specific findings of fact but enters judgment of involuntary nonsuit, the only question presented is whether the evidence, taken in the light most favorable to plaintiff, would support findings of fact upon which plaintiff could recover. Shearin v. Lloyd, 246 N. C. 363, 98 S. E. (2d) 508 (1957); DeBruhl v. L. Harvey & Son Co., 250 N. C. 161, 108 S. E. (2d) 469 (1959); Oldham & Worth, Inc. v. Bratton, 263 N. C. 307, 139 S.E.2d 653 (1965).

Rules of Evidence.—The effect of the submission to the judge is to invest him with the dual capacity of judge and juror. He is to hear the evidence and pass upon its competency and admissibility as judge, and determine its weight and sufficiency as juror. The rules as to the admission and exclusion of evidence are not so strictly enforced as in a jury trial. Everette v. D. O. Briggs Lumber Co., 250 N. C. 688, 110 S. E. (2d) 288 (1959).

Applied in Doub v. Harper, 234 N. C. 14, 65 S. E. (2d) 309 (1951); Dellinger v. Clark, 234 N. C. 419, 67 S. E. (2d) 448 (1951); Queen City Coach Co. v. Carolina Coach Co., 237 N. C. 697, 76 S. E. (2d) 47 (1953); Jamison v. Charlotte, 239 N. C. 423, 79 S. E. (2d) 797 (1954); Parmele v. Eaton, 240 N. C. 539, 83 S. E. (2d) 93 (1954); Ingle v. McCurry, 243 N. C. 65, 89 S. E. (2d) 745 (1955); Coastal Sales Co. v. Weston, 245 N. C. 621, 97 S. E. (2d) 469 (1959); Shue v. Scheidt, 252 N. C. 561, 114 S. E. (2d) 237 (1960); In re Dillingham, 257 N. C. 684, 127 S. E. (2d) 584 (1962); Underwood v. National Grange Mut. Liability Co., 258 N. C. 211,

128 S. E. (2d) 577 (1962); King v. National Union Fire Ins. Co., 258 N. C. 432, 128 S. E. (2d) 849 (1963); Clark's Charlotte, Inc. v. Hunter, 261 N.C. 222, 134 S.E.2d 364 (1964); Arnold v. Ray Charles Enterprises, Inc., 264 N.C. 92, 141 S.E.2d 14 (1965); Welborn Plumbing & Heating Co. v. Randolph County Bd. of Educ., 268 N.C. 85, 150 S.E.2d 65 (1966).

Quoted in part in Icenhour v. Bowman, 233 N. C. 434, 64 S. E. (2d) 428 (1951).

Cited in Morris v. Wilkins, 241 N. C. 507, 85 S. E. (2d) 892 (1955); Boswell v. Boswell, 241 N. C. 515, 85 S. E. (2d) 899 (1955); Merrell v. Jenkins, 242 N. C. 636, 89 S. E. (2d) 242 (1955); Better Home Furniture Co. v. Baron, 243 N. C. 502, 91 S. E. (2d) 236 (1956); Competitor Liaison Bureau of Nascar, Inc. v. Midkiff, 246 N. C. 409, 98 S. E. (2d) 468 (1957); Southern Box & Lumber Co. v. Home Chair Co., 250 N. C. 71, 108 S. E. (2d) 70 (1959); State Planters Bank v. Courtesy Motors, Inc., 250 N. C. 466, 109 S. E. (2d) 189 (1959); Janicki v. Lorek, 255 N. C. 53, 120 S. E. (2d) 413 (1961); Privette v. Lewis, 255 N. C. 612, 122 S. E. (2d) 381 (1961); Eastern Carolina Tastee-Freez, Inc. v. Raleigh, 256 N. C. 208, 123 S. E. (2d) 632 (1962); In re Ahoskie Creek, 257 N. C. 337, 125 S. E. (2d) 908 (1962); Ferrell v. Basnight, 257 N. C. 643, 127 S. E. (2d) 219 (1962).

§ 1-185. Findings of fact and conclusions of law by judge.

Sections 1-184 to 1-187 are to be construed in pari materia with § 1-539.3 et seq. Hajoca Corp. v. Brooks, 249 N. C. 10, 105 S. E. (2d) 123 (1958).

This section applies equally when a jury trial is waived under § 1-539.3 et seq. and when it is waived under § 1-184. Hajoca Corp. v. Brooks, 249 N. C. 10, 105 S E. (2d) 123 (1958). See § 1-539.5, as amended by Session Laws 1959, c. 912, and note thereto.

The judge who tries an issue of fact is required by this section to do these three things in writing: (1) To find the facts on the issue of fact submitted to him; (2) to declare the conclusions of law arising on the facts found by him; and (3) to adjudicate the rights of the parties accordingly. Woodard v. Mordecai, 234 N. C. 463, 67 S. E. (2d) 639 (1951); Bradham v. Robinson, 236 N. C. 589, 73 S. E. (2d) 555 (1952); Goldsboro v. Atlantic Coast Line R. Co., 246 N. C. 101, 97 S. E. (2d) 486 (1957); Morehead v. Harris, 255 N. C. 130, 120 S. E. (2d) 425 (1961).

Sufficient Compliance.—

See Woodard v. Mordecai, 234 N. C. 463, 67 S E (2d) 639 (1951).

Insufficient Compliance.—Statements of facts found by court held insufficient compliance with the requirement of this section. Jamison v. Charlotte, 239 N. C. 423, 79 S. E. (2d) 797 (1954).

Judge Need Find and State Only Ultimate Facts.—Ultimate facts are the final facts required to establish the plaintiff's cause of action or the defendant's defense; and evidentiary facts are those subsidiary facts required to prove the ultimate facts. This section requires the trial judge to find and state the ultimate facts only. Woodard v. Mordecai, 234 N. C. 463, 67 S. E. (2d) 639 (1951). See St. George v. Hanson, 239 N. C. 259, 78 S. E. (2d) 885 (1954); Reid v. Johnston, 241 N. C. 201, 85 S. E. (2d) 114 (1954).

This section requires the trial judge to find and state the ultimate facts only, and not the evidentiary or subsidiary facts required to prove the ultimate facts. Bridges v. Jackson, 255 N. C. 333, 121 S. E. (2d) 542 (1961).

In a trial by the court under agreement of the parties, the court is required to find and state only the ultimate facts. McCallum v. Old Republic Life Ins. Co., 262 N.C. 375, 137 S.E.2d 164 (1964).

Separate Conclusions of Facts and Law.—

In accord with 1st paragraph in original. See Woodard v. Mordecai, 234 N. C. 463, 67 S. E. (2d) 639 (1951); Bradham v. Robinson, 236 N. C. 589, 73 S. E. (2d) 555 (1952).

The judge complies with the requirement that he state his findings of fact and conclusions of law separately if he separates the findings and the conclusions in such a manner as to render them distinguishable, no matter how the separation is effected. Woodard v. Mordecai, 234 N. C. 463, 67 S. E. (2d) 639 (1951).

Where the parties waive jury trial and agree to trial by the court, it is preferable that the court make separate findings of fact and conclusions of law rather than render a verdict on issues submitted to itself. Wynne v. Allen, 245 N. C. 421, 96 S. E. (2d) 422 (1957).

Verdict on Issues Submitted by Court to Itself.—Except in a small claim action, it is irregular for the court, in a trial by the court under agreement of the parties, to render a verdict on issues submitted to itself. Anderson v. Cashion, 265 N.C. 555, 144 S.E.2d 583 (1965).

Unless the action is a small claim, it is irregular for the court to render a verdict on issues submitted to itself. Sherrill v. Boyce, 265 N.C. 560, 144 S.E.2d 596 (1965).

Findings of Judge Conclusive.—
In accord with original. See Priddy v. Kernersville Lumber Co., Inc., 258 N. C. 653, 129 S. E. (2d) 256 (1963).

Judgment Granting Defendant's Motion as of Nonsuit.—
In accord with original. See Goldsboro v. Atlantic Coast Line R. Co., 246 N. C. 101, 97 S. E. (2d) 486 (1957).

Trial of Case on Agreed Statement of Facts.—See U Drive It Auto Co. v. Atlantic Fire Ins. Co., 239 N. C. 416, 80 S. E. (2d) 35 (1954).

Where the parties submit the cause upon stipulation of facts, the hearing is on the facts stipulated, and assignment of error for failure of the court to make certain requested findings of fact and conclusions of law is inapposite. Competitor Liaison Bureau of Nascar, Inc. v. Midkiff, 246 N. C. 409, 98 S. E. (2d) 468 (1957).

Findings Dictated by Judge to Reporter.—Where the judge dictates his findings to the court reporter and causes the reporter to transcribe them, it amounts to a finding of the facts by the judge in writing. Bradham v. Robinson, 236 N. C. 589, 73 S. E. (2d) 555 (1952).

The failure of the judge to sign his findings of fact and incorporate them into the formal judgment rendered in the cause does not render the judgment void, there being a substantial compliance with this section. Bradham v. Robinson, 236 N. C. 589, 73 S. E. (2d) 555 (1952).

Applied in Parmele v. Eaton, 240 N. C. 539, 83 S. E. (2d) 93 (1954); Baker v. Murphrey, 254 N. C. 506, 119 S. E. (2d) 398 (1961); Hodges v. Hodges, 257 N. C. 774, 127 S. E. (2d) 567 (1962); Daniels v. Nationwide Mut. Ins. Co., 258 N. C. 660, 129 S. E. (2d) 314 (1963); State v. Haywood Electric Membership Corp., 260 N. C 59, 131 S. E. (2d) 865 (1963); Stewart v. Rogers, 260 N.C. 475, 133 S.E.2d 155 (1963).

Cited in National Surety Corp. v. Sharpe, 236 N. C. 35, 72 S. E. (2d) 109 (1952); Merrell v. Jenkins, 242 N. C. 636, 89 S. E. (2d) 242 (1955); Peoples v. United States Fire Ins. Co., 248 N. C. 303, 103 S. E. (2d) 381 (1958); Southern Box & Lumber Co. v. Home Chair Co., 250 N. C. 71, 108 S. E. (2d) 70 (1959); State Planters Bank v. Courtesy Motors, Inc., 250 N. C. 466, 109 S. E. (2d) 189 (1959); Everette v. D. O. Briggs Lumber Co., 250 N. C. 688, 110 S. E. (2d) 288 (1959).

§ 1-186. Exceptions to decision of court.

Sections 1-184 to 1-187 are to be construed in pari materia with § 1-539.3 et seq. Hajoca Corp. v. Brooks, 249 N. C. 10, 105 S. E. (2d) 123 (1958).

This section applies equally when a jury trial is waived under § 1-539.3 et seq. and when it is waived under § 1-184. Hajoca Corp. v. Brooks, 249 N. C. 10, 105 S. E. (2d) 123 (1958).

Exceptions Necessary.—
When a trial by jury is waived, in order to preserve for review on appeal an adverse ruling on a motion for judgment as of nonsuit, it is necessary to except to the findings of fact in apt time on the ground that such findings are not supported by the evidence. Exceptions to such findings must be taken within the time allowed by this section. Goldsboro v. Atlantic Coast Line R. Co., 246 N. C. 101, 97 S. E. (2d) 486 (1957).

Since no exceptions were taken to the findings of fact or the conclusions of law, the exception to the refusal to grant the appellant's motion for judgment as of nonsuit presents no question for review with respect to the findings of fact or the conclusions of law. Goldsboro v. Atlantic Coast Line R. Co., 246 N. C. 101, 97 S. E. (2d) 486 (1957).

If one wishes to have the Supreme Court review an affirmance by the superior court of findings by a referee or administrative agency, it is necessary to specifically except to the court's ruling with respect to the fact he wishes to challenge in the time and manner prescribed by this section. Clark Equip. Co. v. Johnson, 261 N.C. 269, 134 S.E.2d 327 (1964).

In a trial by the court under agreement of the parties, mere entry of appeal without the filing of exception to the judgment or to the refusal of the court to find facts as requested until the service of statement on appeal, does not meet the requirements of this section. Nationwide Homes of Raleigh, N.C., Inc. v. First-Citizens Bank & Trust Co., 267 N.C. 528, 148 S.E.2d 693 (1966).

Broadside Exception.—An exception "to each conclusion of law embodied in the judgment" is a broadside exception and does not comply with this section and Rules of Practice in the Supreme Court.

Jamison v. Charlotte, 239 N. C. 682, 80 S. E. (2d) 904 (1954).

Presumption Where Exceptions Not Taken. — Where no exceptions have been taken to the admission of evidence or to the findings of fact, such findings are presumed to be supported by competent evidence and are binding upon appeal. Goldsboro v. Atlantic Coast Line R. Co., 246 N. C. 101, 97 S. E. (2d) 486 (1957).

Exception to the signing of a judgment presents these questions: (1) Do the facts found support the judgment, and (2) does any error of law appear upon the face of the record? Goldsboro v. Atlantic Coast Line R. Co., 246 N. C. 101, 97 S. E. (2d) 486 (1957).

§ 1-187. Proceedings upon judgment on issue of law.

Sections 1-184 to 1-187 are to be construed in pari materia with § 1-539.3 et seq. Hajoca Corp. v. Brooks, 249 N. C. 10, 105 S. E. (2d) 123 (1958).

This section applies equally when a jury trial is waived under § 1-539.3 et seq. and when it is waived under § 1-184. Hajoca Corp. v. Brooks, 249 N. C. 10, 105 S. E. (2d) 123 (1958).

ARTICLE 20.

Reference.

§ 1-188. By consent.

This article relates to trials by referees on evidence offered by litigants. Crew v. Thompson, 266 N.C. 476, 146 S.E.2d 471 (1966).

When Order of Reference Permitted.— No order of reference, either by consent or otherwise, should be permitted by the court until the pleadings are in and the parties are at issue. Crew v. Thompson, 266 N.C. 476, 146 S.E.2d 471 (1966).

Referee Cannot Be Appointed to Attend and Determine Rights at Meeting.—It is not contemplated that a referee be appointed to attend a meeting, such as the annual meeting of the members of an association, and there make determinations relating to the respective rights of contesting parties during the progress of such meeting. Crew v. Thompson, 266 N.C. 476, 146 S.E.2d 471 (1966).

Cited in Better Home Furniture Co. v. Baron, 243 N. C. 502, 91 S. E. (2d) 236 (1956).

§ 1-189. Compulsory.

II. GENERAL CONSIDERATION.

Liberally Construed.—

The trial judge is by this section authorized to order a compulsory reference where the examination of a long account is necessary to settle the controversy. The statutes authorizing trial by referees are liberally construed to facilitate the work of the court and to simplify the issues to be submitted to a jury when the right to trial by jury is preserved. Perry v. Doub, 249 N. C. 322, 106 S. E. (2d) 582 (1959).

The court has discretionary power, etc.— The ordering or refusal to order a compulsory reference in an action which the court has authority to refer is a matter within the sound discretion of the court. Long v. Honeycutt, 268 N.C. 33, 149 S.E.2d 579 (1966).

What Constitutes a "Long Account".— A compulsory reference is not authorized on the ground that the trial requires the examination of long accounts in an action instituted to recover on a promissory note or an account where the receipt of each and every payment alleged to have been made thereon is admitted. Where numerous payments on an indebtedness have been made, the case involves only a matter of computation of figures and has none of the elements of a long account with charges and discharges, as contemplated in this section. Commercial Finance Co. v. Culler, 236 N. C. 758, 73 S. E. (2d) 780 (1953). See Coin Machine Accept. Corp. v. Pillman, 235 N C. 295, 69 S. E. (2d) 563 (1952).

Where an action involved purchases on account over a period of years, it could not be said that the action did not require the examination of a long account within the meaning of this section. Farmers Cooperative Exchange, Inc. v. Scott, 260 N. C. 81, 132 S. E. (2d) 161 (1963).

To hear evidence requiring the examination of a long account involving the books and records of the defendant corporation, numerous calculations of interest, an examination of numerous exhibits, and the determination of the fair value of the stock

of the corporation, would be the equivalent of "the examination of a long account" which would justify the order of reference. Shute v. Fisher, 270 N.C. 247, 154 S.E.2d 75 (1967).

It could not be said as a matter of law from reading the pleadings that plaintiff's cause of action did not require the consideration of a "long account." Long v. Honeycutt, 268 N.C. 33, 149 S.E.2d 579 (1966).

A reference under subsection (2) is in the nature of an interlocutory reference for the information of the court. Such reference involves incidental questions of fact upon a determination of which the court may proceed, and these may be referred without involving the whole case. Harrell v. Harrell, 253 N. C. 758, 117 S. E. (2d) 728 (1961).

But the taking of an account must be necessary, and the accounting taken should have some direct relation to the ultimate disposition of the case. Harrell v. Harrell, 253 N. C. 758, 117 S. E. (2d) 728 (1961).

Compliance.—By objecting to the order of compulsory reference when entered, and by, after the referee's report was filed, filing in apt time exceptions to particular findings of fact made by the referee, tendering issues and demanding a jury trial on each issue tendered, defendants complied with procedural requirements to preserve their right to a jury trial. Farmers Cooperative Exchange, Inc. v. Scott, 260 N. C. 81, 132 S. E. (2d) 161 (1963).

Parties Not Deprived of Jury Trial.—A compulsory reference, under the provisions of this section, does not deprive either party of his constitutional right to a trial by jury of the issues of fact arising on the pleadings, but such trial is only upon the written evidence taken before the referee. And the report of the referee, consisting of his findings of fact and conclusions of law, are incompetent as evidence before the jury. Moore v. Whitley, 234 N. C. 150, 66 S. E. (2d) 785 (1951). See Solon Lodge v. Ionic Lodge, 245 N. C. 281, 95 S. E. (2d) 921 (1957).

Unless There Is a Failure to Follow Appropriate Procedure.—

In accord with 2nd paragraph in original. See Better Home Furniture Co. v. Baron, 243 N. C. 502, 91 S. E. (2d) 236 (1956).

A party to a compulsory reference waives his right to a jury trial by failing to take the proper steps to save it. Bartlett v. Hopkins, 235 N. C. 165, 69 S. E. (2d) 236 (1952).

Where a party makes no demand in his exceptions to the referee's report for a jury trial on the issues tendered by him, he waives his constitutional right to have a jury determine the controverted issues of fact. Bartlett v. Hopkins, 235 N. C. 165, 69 S. E. (2d) 236 (1952).

Unless There Is a Failure, etc.—

Defendants, by not excepting to the order of compulsory reference when made and by proceeding with the trial before the referee, did not preserve the right to challenge the order upon the ground that it should not have been entered before an alleged plea of accord and satisfaction had been passed on, or any other plea in bar they may have alleged. Farmers Cooperative Exchange, Inc. v. Scott, 260 N. C. 81, 132 S. E. (2d) 161 (1963).

Procedural Requirements for Preserving Right to Jury Trial.—In order to preserve his right to a jury trial in a compulsory reference where the referee's report is adverse to him, a party must comply with each of these procedural requirements: 1. He must object to the order of compulsory reference at the time it is made. 2. He must file specific exceptions to particular findings of fact made by the referee within thirty days after the referee delivers his report to the clerk of the court in which the action is pending. 3. He must formulate appropriate issues of fact raised by the pleadings and based on the facts pointed out in his exceptions, and tender such issues with his exceptions to the referee's report. 4. He must set forth in his exceptions to the referee's report a definite demand for a jury trial on each issue so tendered. Bartlett v. Hopkins, 235 N. C. 165, 69 S. E. (2d) 236 (1952).

Where a party objects to a compulsory reference, makes proper exceptions to the findings of fact and conclusions of law of the referee, and tenders the issue of title raised by the pleadings, he has preserved his right to trial by jury. Moore v. Whitley, 234 N. C. 150, 66 S. E. (2d) 785 (1951).

Purpose of Reference Where Right to Jury Trial Reserved.—When the reference is compulsory and the parties have reserved their rights to a jury trial, the practical purpose of the reference and the exceptions is to develop and specifically delimit the issues to be determined by a jury. Coburn v. Roanoke Land & Timber Corp., 257 N. C. 222, 125 S. E. (2d) 593 (1962).

Motion to Refer Must Be Timely.—

The right of a party to move for compulsory reference is waived unless made before the jury has been empaneled, but the rule

does not apply where reference is ordered by the court of its own motion. Shute v. Fisher, 270 N.C. 247, 154 S.E.2d 75 (1967).

In ordering a reference, the exact words of the statute are not required. Shute v. Fisher, 270 N.C. 247, 154 S.E.2d 75 (1967).

Order Not Permitted Until Parties Are at Issue.—No order of reference, either by consent or otherwise, should be permitted by the court until the pleadings are in and the parties are at issue. Crew v. Thompson, 266 N.C. 476, 146 S.E.2d 471 (1966).

The continuance of the case and the allowance of time to file exceptions to the referee's report are matters within the discretion of the court. White v. Price, 237 N. C. 347, 75 S. E. (2d) 244 (1953).

When Exception to Refusal of Jury Trial Untenable.—Even though a party to a compulsory reference by proper exceptions and tender of issues preserves his right to jury trial upon the written evidence taken before the referee, if such evidence is insufficient to raise issues of fact, exception to the refusal of a jury trial is untenable. Nantahala Power & Light Co. v. Horton, 249 N. C. 300, 106 S. E. (2d) 461 (1959).

When Findings of Referee Are Conclusive.—

The findings of fact of the referee, approved by the judge, are conclusive on appeal if there is any competent evidence to support them. Morpul, Inc. v. Mayo Knitting Mill, Inc., 265 N.C. 257, 143 S.E.2d 707 (1965).

Plea in Bar Defeats Order of Reference.—

In accord with 1st paragraph in original. See Shute v. Fisher, 270 N.C. 247, 154 S.E.2d 75 (1967).

A reference should not be ordered when there is a plea in bar which when determined will completely dispose of the controversy; but unless the plea is sufficient, when established, to finally settle the entire controversy, it constitutes no basis for refusing to refer. Sledge v. Miller, 249 N. C. 447, 106 S. E. (2d) 868 (1959).

The plea of title by adverse possession is not such a plea in bar as will prevent a compulsory reference until after the determination of the plea when it appears that the very plea of adverse possession of lappage is based upon a complicated question of boundary within the meaning of subdivision 3 of this section. Champion Paper & Fibre Co. v. Lee, 216 N. C. 244, 4 S. E. (2d) 449 (1939).

Pleas in Bar.—

In an action for trespass to try title, defendants' plea of the three-year statute as a bar to the recovery of damages for trespass and their plea of title by adverse possession under the seven, twenty, twenty-one and thirty year statutes, did not constitute a plea in bar precluding reference since three-year statute would not determine the question of title and the pleas of the other statutes raised the very questions as to the boundaries justifying a reference under the statute. Sledge v. Miller, 249 N. C. 447, 106 S. E. (2d) 868 (1959).

Setting Aside Order of Reference.—Once the order of reference is made, and particularly after the report has been filed, it cannot be set aside except for good and sufficient cause assigned and made to appear to the court. Coburn v. Roanoke Land & Timber Corp., 257 N. C. 222, 125 S. E. (2d) 593 (1962).

In order for one superior court judge to set aside an order of compulsory reference entered by another, the motion would have to go to the validity and regularity of the proceeding or some subsequent change of circumstances affecting the status of the case. Coburn v. Roanoke Land & Timber Corp., 257 N. C. 222, 125 S. E. (2d) 593 (1962).

Cited in Crowley v. McDougald, 241 N. C. 404, 85 S. E. (2d) 377 (1955); Rudisill v. Hoyle, 254 N. C. 33, 118 S. E. (2d) 145 (1961); Caudell v. Blair, 254 N. C. 438, 119 S. E. (2d) 172 (1961).

III. ILLUSTRATIVE CASES.

An action on a note given to finance an automobile, in which all payments alleged by defendant are admitted by plaintiff, does not involve a long account with charges and discharges as contemplated in this section and is not subject to compulsory reference notwithstanding further counterclaims for usury and damage for the mortgagee's alleged breach of his agreement to procure insurance on the car. Commercial Finance Co. v. Culler, 236 N. C. 758, 73 S. E. (2d) 780 (1953).

Action on Conditional Sales Contract.—In an action to recover a specified sum and interest alleged to be due and owing to the plaintiff as the holder in due course of a conditional sales contract alleged to have been executed and delivered by the defendant, in which action no equitable relief is sought, the lower court has no power to authorize a compulsory reference. Coin Machine Accept. Corp. v. Pillman, 235 N. C. 295, 69 S. E. (2d) 563 (1952).

Processioning Proceeding. — A controversy, by stipulation of the parties that

boundary only was involved, became in effect a processioning proceeding and was properly referred under this section. Harrill v. Taylor, 247 N. C. 748, 102 S. E. (2d) 223 (1958).

A case involving a complicated question of boundary which required a personal view of the premises was a proper case for a compulsory reference. Coburn v. Roanoke Land & Timber Corp., 257 N. C. 222, 125 S. E. (2d) 593 (1962).

§ 1-190. How referee chosen or appointed.

Appointment by Court.—Where the parties fail to agree upon a referee, the court may appoint a referee, and such appointment will not be disturbed when only one of the parties objects. Shute v. Fisher, 270 N.C. 247, 154 S.E.2d 75 (1967).

§ 1-194. Report; review and judgment.

When Decisions Reviewable.—This section affords no ground for exception on appeal, unless action by the judge is not supported by sufficient evidence, or error has been committed in receiving or rejecting testimony upon which it is based. Caudell v. Blair, 254 N. C. 438, 119 S. E. (2d) 172 (1961).

Discretion of Judge.—Under this section, a judge of the superior court has a wide latitude of discretion over the report of a referee, with power to review, modify, confirm in whole or in part, or to set aside the report. Keith v. Silvia, 236 N C. 293, 72 S. E. (2d) 686 (1952).

The report of the referee is under the control of the court, and the power of review is a broad one as the court may "set aside, modify, or confirm it in whole or in part." Terrell v. Terrell, 271 N.C. 95, 155 S.E.2d 511 (1967).

When exceptions are taken to a referee's findings of fact and law, it is the duty of the judge to consider the evidence and give his own opinion and conclusion, both upon the facts and the law. He is not permitted to do this in a perfunctory way, but he must deliberate and decide as in other cases—use his own faculties in ascertaining the truth, and form his judgment as to fact and law. This is required not only as a check upon the referee and a safeguard against any possible error on his part, but because he cannot review the referee's findings in any other way. Terrell v. Terrell, 271 N.C. 95, 155 S.E.2d 511 (1967).

When an action came on to be heard on exceptions to a referee's report, the judge of the superior court had authority to affirm in whole or in part, amend, modify, or set aside the report of the referee, or he could make additional findings of fact and enter judgment on the report as amended by him. Hall v. Fayetteville, 248 N. C. 474, 103 S. E. (2d) 815 (1958).

This section and § 1-195 are in pari materia and must be construed together. Coburn v. Roanoke Land & Timber Corp., 257 N. C. 222, 125 S. E. (2d) 593 (1962).

This section does not give the judge power ex mero motu to vacate a report upon which no attack had been made by any of the parties; the authority must be exercised, if at all, in an orderly manner in accord with recognized rules of procedure. These rules of procedure are set out in this section and § 1-195. Coburn v. Roanoke Land & Timber Corp., 257 N. C. 222, 125 S. E. (2d) 593 (1962).

The judge of the superior court may affirm, amend, modify, set aside, confirm in whole or in part, or disaffirm the report of a referee, or he may make additional findings of fact and enter judgment on the report as thus amended. But this does not mean that the judge may, ex mero motu, vacate a report upon which no attack has been made by any of the parties. The authority must be exercised, if at all, in an orderly manner in accord with recognized rules of procedure. Keith v. Silvia, 233 N C. 328, 64 S. E. (2d) 178 (1951). See Keith v. Silvia, 236 N. C. 293, 72 S. E. (2d) 686 (1952).

When the parties agree upon a reference, the consent continues until the order is complied with by a full report, and the judge cannot revoke it without the consent of both parties. Coburn v. Roanoke Land & Timber Corp., 257 N. C. 222, 125 S. E. (2d) 593 (1962).

Even when a report is set aside for cause, the order of reference is not thereby revoked; it continues Coburn v. Roanoke Land & Timber Corp., 257 N. C. 222, 125 S. E. (2d) 593 (1962).

The judge cannot affirm the report of the referee prior to the time for filing exceptions where there has been no waiver of the right to file them. Coburn v. Roanoke Land & Timber Corp., 257 N. C. 222, 125 S. E. (2d) 593 (1962).

Cited in Morpul, Inc. v. Mayo Knitting Mill, Inc., 265 N.C. 257, 143 S.E.2d 707 (1965).

§ 1-195. Report, contents and effect.

Cross Reference.—
See note to § 1-194.

Referee's Duty under This Section.—
This statute prescribing the form of a referee's report, only requires him to make findings of fact, conclusions of law, and his decision. A failure to do more than the minimum required by the statute is not prejudicial error. McCormick v. Smith, 246 N. C. 425, 98 S. E. (2d) 448 (1957).

Additional Matters Incorporated in Report.—The fact that the referee in an action to determine title to land, in addition to entering findings of fact, conclusions of law and his decision, also incorporates in his report an analysis of the statement of contentions of the parties, a summary of the evidence relating to each contention, and his view of the law, was not prejudicial. McCormick v Smith, 246 N. C. 425, 98 S. E. (2d) 448 (1957).

Findings of Fact Conclusive.—
On a consent reference, findings of fact made by a referee, in the absence of exceptions thereto, are conclusive on the hearings in the superior court as they are on appeal to the Supreme Court. The findings to which no exceptions are entered become in effect facts agreed. Keith v Silvia, 233 N C. 328, 64 S E. (2d) 178 (1951). See Keith v. Silvia, 236 N C. 293, 72 S E (2d) 686 (1952).

Purpose of Exceptions Where Reference Is by Consent.—If the refer ce is by consent, the purpose of the exceptions is to bring the controversy into focus for the trial judge, who, in the exercise of his supervisory power and under § 1-194, may affirm, amend modify, set aside, make additional findings, and confirm, in whole or in part, or disaffirm the report of a referee. This he may do, however, only in passing upon exceptions, for in the absence of exceptions to the factual findings of a referee, such findings are conclusive, and where no exceptions are filed, the case is to be determined upon the facts as found by the referee. Coburn v. Roanoke Land & Timber Corp., 257 N. C. 222, 125 S. E. (2d) 593 (1962).

Purpose of Exceptions Where Reference Is Compulsory and Right to Jury Trial Reserved.—When the reference is compulsory and the parties have reserved their rights to a jury trial, the practica' purpose of the reference and the exceptions is to develop and specifically delimit th issues to be determined by a jury. Coburn v. Roanoke Land & Timber Corp., 257 N. C. 222, 125 S. E. (2d) 593 (1962).

The trial judge must act upon the report even in a compulsory reference where the right to the trial by jury has been preserved. Coburn v. Roanoke Land & Timber Corp., 257 N. C. 222, 125 S. E. (2d) 593 (1962).

Time of Filing Exceptions.—Where motion to remove the referee is made prior to the time his report is filed, and an appeal is taken from the granting of the motion, the superior court, upon the certification of the decision of the Supreme Court, reversing the judgment, has discretionary power to allow the filing of exceptions to the report, even though the report was filed prior to the hearing of the motion for removal. Keith v Silvia, 236 N. C. 293, 72 S. E. (2d) 686 (1952).

A provision in an order of re-reference that the parties should have twenty days from the referee's report in which to file exceptions cannot have greater force than the limitation of this section and does not impair the discretionary authority given the court by § 1-152 to extend the time for filing such exceptions. Godwin v. Hinnant, 250 N. C. 328, 108 S. E. (2d) 658 (1959).

Motion for Voluntary Nonsuit Does Not Preclude Filing of Exceptions.—Motion by plaintiff for voluntary nonsuit before the referee appointed to hear the cause does not preclude her from filing exceptions to the referee's report. Crowley v. McDougald, 241 N. C. 404, 85 S. E. (2d) 377 (1955).

Premature Entry of Judgment.—Where the record discloses that judgment confirming the report of a referee was entered at a term of court convening before the expiration of the 30-day period for filing exceptions, and the record discloses no waiver of the right to file exceptions at any time during the 30-day period, the premature entry of judgment of confirmation is error appearing on the face of the record. Crowley v McDougald, 241 N. C. 404, 85 S. E. (2d) 377 (1955).

Stated in State v. Johnson, 251 N. C. 339, 111 S. E. (2d) 297 (1959).

Cited in Cratch v. Taylor, 256 N. C. 462, 124 S. E. (2d) 124 (1962); Morpul, Inc. v. Mayo Knitting Mill, Inc., 265 N.C. 257, 143 S.E.2d 707 (1965).

Article 21.

Issues.

§ 1-196. Defined.

Purpose of requirement that issues must arise on the pleadings is to prevent surprise and to give each party the opportunity to prepare his case. Rural Plumbing & Heating, Inc. v. H. C. Jones Constr. Co., 268 N.C. 23, 149 S.E.2d 625 (1966).

An issue of fact arises on the pleadings whenever a material fact is maintained by one part and controverted by the other. A material fact is one which constitutes a part of the plaintiff's cause of action or the defendant's defense. Wells v Clayton, 236 N C 103, 72 S E (2d) 16 (1952); In the Matter of Wallace, 267 N.C. 204, 147 S.E.2d 922 (1966).

An issue of fact arises when the answer controverts a material allegation of the complaint. Baker v. Malan Constr. Corp., 255 N. C. 302 121 S. E. (2d) 731 (1961).

Duty of Judge.—It is the duty of the judge to submit such issues as are necessary to settle the material controversies in the pleadings. In the absence of such issues, without admissions of record sufficient to justify the judgment rendered, the Supreme Court will remand the case for a new trial. Rural Plumbing & Heating, Inc. v. H. C. Jones Constr. Co., 268 N.C. 23, 149 S.E.2d 625 (1966).

Error to Submit Issue Not Raised by Pleadings.—Where the pleadings do not distinctly and unequivocally raise an issue, it should not be submitted. Rural Plumbing & Heating, Inc. v. H. C. Jones Constr. Co., 268 N.C. 23, 149 S.E.2d 625 (1966).

Courts look with favor on stipulations designed to simplify, shorten, or settle litigation and save cost to the parties, and such practice will be encouraged. Rural Plumbing & Heating, Inc. v. H. C. Jones Constr. Co., 268 N.C. 23, 149 S.E.2d 625 (1966).

Although the parties may not agree upon improper issues they may, by stipulation or judicial admission, establish any material fact which has been in controversy between them, and thereby eliminate the necessity of submitting an issue to the jury with reference to it. Rural Plumbing & Heating, Inc. v. H. C. Jones Constr. Co., 268 N.C. 23, 149 S.E.2d 625 (1966).

But stipulations do not dispense with necessity that pleadings support proof. Rural Plumbing & Heating, Inc. v. H. C. Jones Constr. Co., 268 N.C. 23, 149 S.E.2d 625 (1966).

The pleadings must support the judgment, which may not be based on facts not alleged in the complaint and entirely inconsistent with it. Rural Plumbing & Heating, Inc. v. H. C. Jones Constr. Co., 268 N.C. 23, 149 S.E.2d 625 (1966).

When the facts constituting a waiver do not appear in the pleadings, the party relying thereon must specially plead the defense, and it must be pleaded with certainty and particularity and established by the greater weight of the evidence. Rural Plumbing & Heating, Inc. v. H. C. Jones Constr. Co., 268 N.C. 23, 149 S.E.2d 625 (1966).

Stated in Jenkins v. Trantham, 244 N. C. 422, 94 S. E. (2d) 311 (1956); General Tire & Rubber Co. v. Distributors, Inc., 253 N. C. 459, 117 S. E. (2d) 479 (1960); Michael Flynn Mfg. Co. v. J. L. Coe Constr. Co., Inc., 259 N. C. 649, 131 S. E. (2d) 487 (1963).

§ 1-197. Of law.

Cited in Baker v. Malan Constr. Corp., 255 N. C. 302, 121 S. E. (2d) 731 (1961).

§ 1-198. Of fact.

Error to Submit Issue, etc.—

In accord with 1st paragraph in original. See Jenkins v. Trantham, 244 N. C. 422, 94 S E (2d) 311 (1956).

Material Fact.—An issue of fact arises upon the pleadings whenever a material fact is maintained by one party and controverted by the other. A material fact is one which constitutes a part of the plaintiff's cause of action or the defendant's defense. In the Matter of Wallace, 267 N.C. 204, 147 S.E.2d 922 (1966).

§ 1-200. Form and preparation.

This section is mandatory. It is the duty of the judge, either of his own motion or at the suggestion of counsel, to submit such issues as are necessary to settle the material controversies arising on the pleadings. Wheeler v. Wheeler, 239 N. C. 646, 80 S. E. (2d) 755 (1954); Nebel v. Nebel, 241 N C. 491, 85 S E. (2d) 876 (1955). See Coulbourn v. Armstrong, 243 N C. 663, 91 S. E. (2d) 912 (1956); General Tire

& Rubber Co. v. Distributors, Inc., 253 N. C. 459, 117 S. E. (2d) 479 (1960).

This section mandatory in the requirement that an issue or issues of fact raised by the pleadings shall be submitted to the jury. Baker v. Malan Constr. Corp., 255 N. C. 302, 121 S. E. (2d) 731 (1961).

And it is binding equally upon the court and upon counsel. Nebel v. Nebel, 241 N. C. 491, 85 S. E. (2d) 876 (1955).

It requires that the court submit such issues as are necessary to settle the material controversies arising on the pleadings, including new matter alleged in the answer, so that the answers thereto will support a final judgment. Durham Lumber Co. v. Wrenn-Wilson Constr. Co., 249 N. C. 680, 107 S. E. (2d) 538 (1959).

But Only Issues "Material to Be Tried" Are to Be Submitted.—Even though the facts relating to a particular issue are controverted in the pleadings, when such issue is not "material to be tried" under this section and is not determinative of the rights of the parties, it is error to submit such issue. Henry Vann Co. v. Barefoot, 249 N. C. 22, 105 S. E. (2d) 104 (1958).

Issues arise upon the pleadings only and not upon the evidential facts. Darroch v. Johnson, 250 N. C. 307, 108 S. E. (2d) 589 (1959).

Ordinarily the form and number of issues in a civil action are left to the sound discretion of the judge, etc.—

In accord with 1st paragraph in original. See Durham Lumber Co. v. Wrenn-Wilson Constr. Co., 249 N. C. 680, 107 S. E. (2d) 538 (1959); General Tire & Rubber Co. v. Distributors, Inc., 253 N. C. 459, 117 S. E. (2d) 479 (1960).

When Sufficient.—

In accord with 2nd paragraph in original. See Coulbourn v. Armstrong, 243 N. C. 663, 91 S. E. (2d) 912 (1956).

The court need not submit issues in any particular form. If they are framed in such a way as to present the material matters in dispute and so as to enable each of the parties to have the full benefit of his contention before the jury and a fair chance to develop his case, and if, when answered, the issues are sufficient to determine the rights of the parties and to support the judgment, the requirement of this section is fully met. O'Briant v. O'Briant, 239 N. C. 101, 79 S. E. (2d) 252 (1953).

Denial of Allegation of Wrongful Possession.—In an action to recover possession of personalty, defendant's denial of the allegation that she is in the wrongful possession raises an issue for the jury, since even though plaintiff be owner of the property, it does not follow that defendant is in the wrongful possession thereof. Coulbourn v. Armstrong, 243 N. C. 663, 91 S. E. (2d) 912 (1956).

Applied in Robertson v. Robertson, 255 N. C. 581, 122 S. E. (2d) 385 (1961).

Cited in Bowling v. Bowling, 252 N. C. 527, 114 S. E. (2d) 228 (1960); Hill v. Federal Life & Casualty Co., 252 N. C. 649, 114 S. E. (2d) 648 (1960).

ARTICLE 22.

Verdict and Exceptions.

§ 1-201. General and special.

I. GENERAL CONSIDERATION.

The language of this section is in accord with the case of State v. Ewing, 108 N.C. 755, 13 S.E. 10 (1891), and is approved as the better practice. State v. Ellis, 262 N.C. 446, 137 S.E.2d 840 (1964).

Manner of Arriving at General Verdict.—In arriving at a general verdict, the jurors take the law as given by the court and apply the law to the facts as they find them to be, and reach a general conclusion, usually "guilty" or "not guilty." State v. Ellis, 262 N.C. 446, 137 S.E.2d 840 (1964).

Form of Special Verdict. — Ordinarily, the form of a special verdict is a written recital of the jury's findings of the ultimate material facts. State v. Ellis, 262 N.C. 446, 137 S.E.2d 840 (1964).

It was originally a requirement in this jurisdiction that the special verdict state that the jury finds the accused guilty if, in the opinion of the court upon the facts found, he is guilty, and not guilty if, in the opinion of the court, the facts found do not establish guilt. State v. Ellis, 262 N.C. 446, 137 S.E.2d 840 (1964).

A special verdict is in itself a verdict of guilty or not guilty, as the facts found in it do, or do not, constitute in law the offense charged. State v. Stewart, 91 N.C. 566 (1884). The procedure outlined in State v. Love, 238 N.C. 283, 77 S.E.2d 501 (1953), and cases tried in accordance with that procedure will not be held erroneous by reason of such procedure. State v. Ellis, 262 N.C. 446, 137 S.E.2d 840 (1964).

And Court May Enter Judgment Thereon.—Upon the special verdict in a case,

the court should simply declare its opinion that the defendant is guilty or not guilty, and enter judgment accordingly. Indeed, the simple entry of judgment in favor of or against the defendant would be sufficient. It is plain and convenient, will prevent further conflict of decision, and should be observed. State v. Ellis, 262 N.C. 446, 137 S.E.2d 840 (1964).

If Material Facts Are Found No General Verdict Is Necessary.—Where there is a special verdict, finding the material facts, no general verdict of guilt or innocence is necessary. State v. Ellis, 262 N.C. 446, 137 S.E.2d 840 (1964), citing State v. Ewing, 108 N.C. 755, 13 S.E. 10 (1891).

But Special Verdict Must Find Sufficient Facts to Permit Conclusion upon Which Judgment Rests.—A special verdict must find sufficient facts to permit of the conclusion of law upon which the judgment rests. State v. Ellis, 262 N.C. 446, 137 S.E.2d 840 (1964).

A special verdict is defective if a material finding is omitted. State v. Ellis, 262 N.C. 446, 137 S.E.2d 840 (1964).

In a prosecution for willful nonsupport of an illegitimate child, a verdict upon the issues of paternity and nonsupport, if resolved in favor of the State, is sufficient to support a judgment against defendant without a general verdict by the jury of guilty. This does not contravene the provisions of Art. I, §§ 11 and 13, of the Constitution of North Carolina, requiring trial and verdict by jury in criminal cases. State v. Ellis, 262 N.C. 446, 137 S.E.2d 840 (1964).

The verdict of the jury on the issues of paternity and nonsupport is in the nature of a special verdict. State v. Ellis, 262 N.C. 446, 137 S.E.2d 840 (1964).

§ 1-203. Character of, for different actions.

Quoted in General Tire & Rubber Co. v. Distributors, Inc., 253 N. C. 459, 117 S. E. (2d) 479 (1960).

§ 1-206. Objections and exceptions.—(a) If an exception is taken upon the trial, it must be reduced to writing at the time with so much of the evidence or subject matter as may be material to the exception taken; the same must be entered in the judge's minutes and filed with the clerk as a part of the case upon appeal.

(b) If there is error, either in the refusal of the judge to grant a prayer for instructions, or in granting a prayer, or in his instructions generally, the same is deemed excepted to without the filing of any formal objections.

(c) In any trial or hearing no exception need be taken to any ruling upon an objection to the admission of evidence, and no exception need be taken to any ruling sustaining an objection to the admission of evidence by the party against whom the ruling is made. Such overruling of an objection to the admission of evidence or such sustaining of an objection to the admission of evidence shall be deemed to imply an exception by the party against whom the ruling was made.

(d) In any trial or hearing, without any objection being made to such question by any party or any exception thereto being taken, it shall be deemed that an objection to each question propounded to a witness by the court or a juror has been duly made and overruled, and that an exception has been duly taken by each party to each such question, and in such case no objection or exception shall be necessary. (C. C. P., s. 236; Code, s. 412; Rev., s. 554; C. S., s. 590; 1949, c. 150; 1953, c. 57; 1965, c. 748.)

I. OBJECTIONS AND EXCEPTIONS GENERALLY.

Editor's Note.—

The 1953 amendment rewrote the catchline and added subsection (d). For brief comment on amendment, see 31 N. C. Law Rev 400.

The 1965 amendment rewrote subsection (c).

This section protects a litigant whose objection to the admission of evidence is overruled. It makes no provision for the protection of the adversary party who sits by and fails to except when an objection to evidence is sustained. Barger v. Krimminger, 262 N.C. 596, 138 S.E.2d 207 (1964).

Section Does Not Obviate Necessity of Making Objection to Admission of Evidence.—This section provides that no exception need be taken to any ruling upon an objection to the admission of evidence, but it does not do away with the necessity of making an objection to the ruling of the

court. Thus, if no objection is made to the ruling of the court in apt time, a party will be deemed to have waived his rights. State v. Howell, 239 N. C. 78, 79 S. E. (2d) 235 (1953).

Necessity for Setting Out and Numbering Exceptions.—The provisions of this section, as amended by chapter 150, Session Laws of 1949, and by chapter 57, Session Laws of 1953, do not eliminate the necessity for setting out and numbering the exceptions relied upon in the statement of the case on appeal. Barnette v. Woody, 242 N. C. 424, 88 S. E. (2d) 223 (1955).

Exceptions Appearing Only in Assignments of Error Not Considered on Appeal.—Assignments of error purporting to be supported by exceptions which appear nowhere in the record except in the purported assignments of error are ineffective and will not be considered on appeal. Cratch v. Taylor, 256 N. C. 462, 124 S. E. (2d) 124 (1962).

Section Inapplicable to Facts of Case.—See State v. Jenkins, 234 N. C. 112, 66 S. E. (2d) 819 (1951).

Stated in State v. Walker, 266 N.C. 269, 145 S.E.2d 833 (1966).

Cited in Conrad v. Conrad, 252 N. C. 412, 113 S. E. (2d) 912 (1960).

§ 1-207. Motion to set aside.

Discretion of the Judge.—When no matter of law or legal inference is involved, the granting or refusing a new trial upon all or any one of the issues rests in the sound discretion of the trial judge. Muse v. Muse, 234 N. C. 205, 66 S. E. (2d) 689 (1951).

A motion to set aside the verdict as being contrary to the weight of the evidence is addressed to the sound discretion of the presiding judge, and the court's refusal of the motion will not be disturbed on appeal in the absence of a showing of abuse. Ponros v. Nello L. Teer Co., 236 N. C. 144, 72 S. E. (2d) 9 (1952); Frye & Sons, Inc. v. Francis, 242 N. C. 107, 86 S. E. (2d) 790 (1955).

A motion for a new trial upon the ground of newly discovered evidence is addressed to the sound discretion of the trial court which is not reviewable in the absence of an abuse. State v. Dixon, 259 N. C. 249, 130 S. E. (2d) 333 (1963).

The power of the court to set aside the verdict as a matter of discretion has always been inherent, and is necessary to the proper administration of justice. Selph v. Selph, 267 N.C. 635, 148 S.E.2d 574 (1966).

The trial judge has the discretionary power to set aside a verdict when, in his opinion, it would work injustice to let it stand; and if no question of law or legal inference is involved in the motion, his action in so doing is not subject to review on appeal in the absence of a clear abuse of discretion. Selph v. Selph, 267 N.C. 635, 148 S.E.2d 574 (1966).

It is not necessary to find the facts when the verdict is set aside as a matter of discretion. Selph v. Selph, 267 N.C. 635, 148 S.E.2d 574 (1966).

Motion Must Be Made and Heard at Trial Term unless Parties Consent. — A motion to set aside a verdict because it is against the greater weight of the evidence must be made and heard at the term (or session) at which the case is tried, unless the parties give their express or implied consent that it may be heard thereafter. Rouse v. Snead, 269 N.C. 623, 153 S.E.2d 1 (1967).

Consent to Signing of Judgment at Succeeding Term Does Not Authorize Different Judgment.—Where a motion to set aside the verdict on ground it is contrary to the weight of evidence is made and denied at the trial term, agreement of the parties that the court could sign the judgment at the succeeding term does not authorize the court to grant a motion to set aside the verdict at the succeeding term. Rouse v. Snead, 269 N.C. 623, 153 S.E.2d 1 (1967).

Incorporation in Minutes of Verbal Order.—Where the trial court, in the exercise of its discretion, enters an oral order during term and after hearing, setting aside the verdict on the ground that it was contrary to the greater weight of the evidence, the court has the power, in signing the minutes of the term some ten days thereafter and out of the county, to incorporate in the minutes his verbal order. Stamey v. Seaboard Airline R.R., 268 N.C. 206, 150 S.E.2d 193 (1966).

Review of Action of Judge.—If the motion to set aside a verdict is based upon exceptions taken during the trial, or upon circumstances which involve the legal validity of the verdict, or the ruling is based upon the existence or nonexistence of legal authority to make it, the action of the court is subject to review. Southeastern Fire Ins. Co. v. Walton, 256 N. C. 345, 123 S. E. (2d) 780 (1962).

Setting Aside Verdict Where Plaintiff Moved for Voluntary Nonsuit.—Order setting aside the verdict is subject to review

when the reason assigned therefor is that plaintiff "moved for judgment of voluntary nonsuit before the verdict of the jury was rendered." But no error was committed in setting aside the verdict, for plaintiff had taken a nonsuit before the verdict was rendered, the case was at an end, and the court had no authority to accept or implement the purported verdict Southeastern Fire Ins. Co. v. Walton, 256 N. C. 345, 123 S. E. (2d) 780 (1962).

Effect of Setting Aside Verdict.—Once the verdict was set aside the status of the case upon the docket was the same as if it had never been tried. Thereupon, the plaintiff had the right to enter its voluntary nonsuit. Southeastern Fire Ins. Co. v. Walton, 256 N. C. 345, 123 S. E. (2d) 780 (1962).

SUBCHAPTER VIII. JUDGMENT.

ARTICLE 23.

Judgment.

§ 1-208. Defined.

Definition of Interlocutory Order.—A judgment is interlocutory when subject to change by the court, during the pendency of the action, to meet the exigencies of the case. Skidmore v. Austin, 261 N.C. 713, 136 S.E.2d 99 (1964).

It is not proper to enter a partial judgment on the pleadings for a part of a litigant's claim, leaving controverted issues of fact relating to other parts of such claim open for subsequent trial Erickson v Starling, 235 N. C. 643, 71 S. E. (2d) 384 (1952).

§ 1-209. Judgments authorized to be entered by clerk; sale of property; continuance pending sale; writs of assistance and possession.

An Enabling Act.—In accord with 1st paragraph in original. See Rich v. Norfolk Southern Ry. Co., 244 N. C. 175, 92 S. E. (2d) 768 (1956).

Tax Foreclosure Proceedings.—To put at rest any question as to the power of the clerk in tax foreclosure proceedings, the 1929 legislature gave clerks of the superior court express authority, except where answer was filed raising issues of fact, to make all orders necessary to consummate the foreclosure. The substance of this statute now appears as the last paragraph of this section. Travis v. Johnston, 244 N C. 713, 95 S E (2d) 94 (1956)

Default Judgment May Be Entered in Action for Breach of Contract to Pay Sum.—The authority conferred upon clerks of superior courts by § 1-211 and this section includes authority to enter judgment by default final when the complaint sets forth a cause of action for the breach of an express or implied contract to pay, absolutely or upon a contingency, a sum or sums of money fixed by the terms of the contract, or capable of being ascertained therefrom by computation. Freeman v. Hardee's Food Sys., Inc., 267 N.C. 56, 147 S.E.2d 590 (1966).

Judgment of Voluntary Nonsuit.—A judgment of voluntary nonsuit may be entered before the clerk of superior court at anytime, or before the judge at term. In re Burton, 257 N. C. 534, 126 S. E. (2d) 581 (1962).

Judgment Entered without Authority, etc.—When a clerk of superior court, without statutory authority, enters a judgment by default final, it is subject to attack by motion in the cause and will be vacated. Freeman v. Hardee's Food Sys., Inc., 267 N.C. 56, 147 S.E.2d 590 (1966).

Where Complaint Does Not Allege Sufficient Facts.—The clerk's judgment by default final should be vacated if the complaint does not allege facts sufficient to constitute a basis therefor. Freeman v. Hardee's Food Sys., Inc., 267 N.C. 56, 147 S.E.2d 590 (1966).

Consent Judgment May Be Set Aside for Fraud, Mistake or Lack of Consent.—Where parties solemnly consent that a certain judgment shall be entered on the record, it cannot be changed or altered, or set aside without the consent of the parties to it, unless it appears, upon proper allegation and proof and a finding of the court, that it was obtained by fraud or mutual mistake, or that consent was not in fact given. Overton v. Overton, 259 N. C. 31, 129 S. E. (2d) 593 (1963).

But Entire Judgment Must Be Set Aside.—It is a general rule that in a case where a consent judgment may be set aside for cause, it must be set aside in its entirety. Overton v. Overton, 259 N. C. 31, 129 S. E. (2d) 593 (1963).

The court has the power to set aside a consent judgment, as a whole, but not to eliminate from it that part which affects some of the parties only. Overton v. Overton, 259 N. C. 31, 129 S. E. (2d) 593 (1963).

Lack of Consent Renders Judgment Void.—The power of the court to sign a consent judgment depends upon the unqualified consent of the parties thereto and the judgment is void if such consent does not exist at the time the court sanctions or approves the agreement of the parties and promulgates it as a judgment. Overton v. Overton, 259 N. C. 31, 129 S. E. (2d) 593 (1963).

And Inoperative in Its Entirety.—A consent judgment rendered without the consent of a party will be held inoperative in its entirety. Overton v. Overton, 259 N. C. 31, 129 S. E. (2d) 593 (1963).

And It Will Be Vacated without Showing of Meritorious Defense.—When a purported consent judgment is void for want of consent of one of the parties, such party is not required to show a meritorious defense in order to vacate the void judgment. Overton v. Overton, 259 N. C. 31, 129 S. E. (2d) 593 (1963).

Findings on Consent Supported by Evidence Are Binding.—When a party to an action denies that he gave his consent to the judgment as entered, the proper procedure is by motion in the cause. And when the question is raised, the court, upon motion, will determine the question. The findings of fact made by the trial judge in making such determination, where there is some supporting evidence are final and binding on the Supreme Court. Overton v. Overton, 259 N. C. 31, 129 S. E. (2d) 593 (1963).

Applied in Schlagel v. Schlagel, 253 N. C. 787, 117 S. E. (2d) 790 (1961).

Cited in Pate v. R. L. Pittman Hospital, Inc., 234 N. C. 637, 68 S. E. (2d) 288 (1951); Boone v. Sparrow, 235 N. C. 396, 70 S. E. (2d) 204 (1952); Morris v. Wilkins, 241 N. C. 507, 85 S. E. (2d) 892 (1955); Keith Tractor & Implement Co. v. McLamb, 252 N. C. 760, 114 S. E. (2d) 668 (1960); Scott v. Scott, 259 N. C. 642, 131 S. E. (2d) 478 (1963).

§ 1-209.1. Petitioner who abandons condemnation proceeding taxed with fee for respondent's attorney.—In all condemnation proceedings authorized by G. S. 40-2 or by any other statute, the clerks of the superior courts are authorized to fix and tax the petitioner with a reasonable fee for respondent's attorney in cases in which the petitioner takes or submits to a voluntary nonsuit or otherwise abandons the proceeding. (1957, c. 400, s. 1.)

Cited in North Carolina State Highway Comm'n v. York Industrial Center, Inc., 263 N.C. 230, 139 S.E.2d 253 (1964).

§ 1-209.2. Voluntary nonsuit by petitioner in condemnation proceeding.—The petitioner in all condemnation proceedings authorized by G. S. 40-2 or by any other statute is authorized and allowed to take a voluntary nonsuit. (1957 c. 400, s. 2.)

Right to Take Nonsuit Recognized Prior to Enactment of Section.—The right of a petitioner in a condemnation proceeding to submit to a voluntary nonsuit, at any time prior to the vesting of title in condemnor, had been judicially recognized prior to the enactment of this section. North Carolina State Highway Comm'n v. York Industrial Center, Inc., 263 N.C. 230, 139 S.E.2d 253 (1964).

This section does not permit condemnor to avoid payment of compensation by taking a nonsuit after title to the property has vested in condemnor. North Carolina State Highway Comm'n v. York Industrial Center, Inc., 263 N.C. 230, 139 S.E.2d 253 (1964).

§ 1-211. By default final.

6. In actions to remove cloud from title to real estate. (C. C. P., s. 217; 1869-70, c. 193, s. 4; 1870-1, c. 42; Code, ss. 385, 390; Rev., s. 556; 1919, c. 26; C. S., s. 595; 1929 c. 66; 1961, c. 295.)

I. IN GENERAL.

Editor's Note.—The 1961 amendment added subsection 6. As the rest of the section was not affected by the amendment it is not set out.

A. Failure to File Answer.

Cited in White v. Southard, 236 N. C. 367, 72 S. E. (2d) 756 (1952); Keith Tractor & Implement Co. v. McLamb, 252 N. C. 760, 114 S. E. (2d) 668 (1960).

B. The Complaint.

Complaint Must Allege Sufficient Facts. —The clerk's judgment by default final should be vacated if the complaint does not allege facts sufficient to constitute a basis therefor. Freeman v. Hardee's Food Sys., Inc., 267 N.C. 56, 147 S.E.2d 590 (1966).

Verification of Complaint Essential. — Default judgments on an obligation specific in amount or to be ascertained by inquiry can only be rendered when the complaint has been duly verified. Pruitt v. Taylor, 247 N. C. 380, 100 S. E. (2d) 841 (1957).

Breach of Contract.—

The authority conferred upon clerks of superior courts by § 1-209 and this section includes authority to enter judgment by default final when the complaint sets forth a cause of action for the breach of an express or implied contract to pay, absolutely or upon a contingency, a sum or sums of money fixed by the terms of the contract, or capable of being ascertained therefrom by computation Freeman v. Hardee's Food Sys., Inc., 267 N.C. 56, 147 S.E.2d 590 (1966).

II. NATURE AND ESSENTIALS.

B. Service of Summons.

Appearance to Set Aside Judgment for Want of Service. — Defendant's appearance in connection with her motion to set aside a default judgment on the ground of want of service does not validate the void judgment. Harrington v. Rice, 245 N. C. 640, 97 S. E. (2d) 240 (1957).

IV. REAL PROPERTY.

In actions for the recovery or possession of real property, if the defendant fails to file the required bond, and is not excused under § 1-112, the plaintiff is entitled to judgment by default final as to title and possession. By this section the clerk is authorized to enter such judgment. Morris v. Wilkins, 241 N. C. 507, 85 S. E. (2d) 892 (1955).

Judgment Declaring Trust.—The clerk of the superior court has no jurisdiction to enter a judgment by default final declaring a trust in favor of the plaintiff in real property. Deans v. Deans, 241 N. C. 1, 84 S. E. (2d) 321 (1954).

Where Plaintiff Has Taken Possession of Land by Unauthorized Entry after Commencement of Action.—In an action for the recovery or possession of real property a plaintiff is not entitled to the summary relief of judgment by default final ordinarily available upon defendant's failure to give the defense bond prescribed by § 1-111 when plaintiff takes possession of the lands in controversy or any substantial portion thereof by unauthorized entry after commencement of the action unless and until he first restores the status quo in respect of possession existing as of the date of the commencement of the action. Morris v. Wilkins, 241 N. C. 507, 85 S. E. (2d) 892 (1955).

Bond Not Required Where Defendant Not in Actual Possession.—In an action for damages for trespass upon realty in which there is no allegation to the effect that the defendant is in actual possession of the property or any part thereof, the defendant is not required to post bond before answering, as required by subsection 4 of this section. Wilson v. Chandler, 238 N. C. 401, 78 S. E. (2d) 155 (1953).

VI. SETTING ASIDE.

Meritorious Defense.—

A meritorious defense is not essential or relevant on motion to set aside a default judgment for want of jurisdiction for lack of service. Harrington v. Rice, 245 N. C. 640, 97 S. E. (2d) 239 (1957).

The proper procedure to attack a judgment by default as void for nonservice of summons in contradiction of regular return of summons of record is by motion in the cause. Harrington v. Rice, 245 N. C. 640, 97 S. E. (2d) 239 (1957). As to proof of nonservice of summons, see note to § 1-592.

Judgment Entered without Authority.—When a clerk of superior court, without statutory authority, enters a judgment by default final, it is subject to attack by motion in the cause and will be vacated. Freedman v. Hardee's Food Sys., Inc., 267 N.C. 56, 147 S.E.2d 590 (1966).

Judgment on Unverified Complaint. — Subsection 1 applies to a cause of action for the breach of an express or implied contract to pay a sum of money fixed by the terms of the contract. A judgment by default final in that kind of suit, on an unverified complaint, is irregular and will be set aside on motion made in apt time and on a proper show of merits. Walker v. Story, 262 N.C. 707, 138 S.E.2d 535 (1964).

§ 1-212. By default and inquiry.—In all other actions, except those mentioned in § 1-211, when the defendant fails to answer and upon a like proof, judgment by default and inquiry may be had, and inquiry shall be executed at

the next succeeding term. If the taking of an intricate or long account is necessary to execute properly the inquiry, the court, at the return term, may order the account to be taken by the clerk of the court or some other fit person, and the referee shall make his report at the next succeeding term; in all other cases except small claims under article 43A of this chapter the injury shall be executed by a jury, unless by consent the court is to try the facts as well as the law. (Code, s. 386; Rev., s. 557; C. S., s. 596; 1963, c. 468, s. 1.)

Editor's Note. — The 1963 amendment inserted near the end of the section the words "except small claims under article 43A of this chapter."

Nature in General.—

In accord with 4th paragraph in original. See Morton v. Blue Ridge Ins. Co., 255 N. C. 360, 121 S. E. (2d) 716 (1961).

Defendants' failure to answer admits only the averments in the complaint and does not preclude them from showing that such averments are insufficient to warrant recovery. Morton v. Blue Ridge Ins. Co., 255 N. C. 360, 121 S. E. (2d) 716 (1961).

Averments Sufficient to State Cause of Action Are Sufficient to Support Judgment.—Facts stated in the complaint which are sufficient to constitute a cause of action are therefore sufficient to support a judgment by default and inquiry. Morton v. Blue Ridge Ins. Co., 255 N. C. 360, 121 S. E. (2d) 716 (1961).

But If Complaint Is Insufficient Judgment May Be Vacated.—Defendants are entitled to have the judgment vacated if the facts set out in the complaint should be determined to be insufficient to constitute a cause of action, as there would then be no basis upon which the default judgment could be predicated. Morton v. Blue Ridge Ins. Co., 255 N. C. 360, 121 S. E. (2d) 716 (1961).

Judgment Not Precluded by Petition Seeking Limitation of Liability.—In an action for damages arising out of a boat collision on a lake, defendant's filing of a petition in admiralty seeking a limitation of liability (46 U.S.C. § 183 et seq.) is not a motion within the purview of § 1-125, and does not preclude the clerk from entering a judgment by default and inquiry under this section for failure of defendant to answer or demur within the time limited. Potts v. Howser, 267 N.C. 484, 148 S.E.2d 836 (1966).

Nor by Motion for Extension of Time.—Motion for extension of time in which to demur or plead is not a motion required by statute to be made prior to the filing of answer within the purview of § 1-125, and upon denying such motion the clerk is authorized to enter judgment by default for failure of defendant to demur or answer within the time limited. Potts v. Howser, 267 N.C. 484, 148 S.E.2d 836 (1966).

There is no requirement that the clerk should immediately sign a judgment by default and inquiry for failure by defendant to appear and demur or plead, when the time to demur or plead has expired. Potts v. Howser, 267 N.C. 484, 148 S.E.2d 836 (1966).

Only Amount of Damages Is Left Open for Inquiry.—When the judgment by default and inquiry has established plaintiff's cause of action as alleged in his complaint, the plaintiff is entitled to such damages as flow from or arise out of said cause of action. Only the amount of these damages, to be ascertained by a jury, is left open for inquiry. Wilson v. Chandler, 238 N. C. 401, 78 S. E. (2d) 155 (1953); Denny v. Coleman, 245 N. C. 90, 95 S. E. (2d) 352 (1956).

A defendant is entitled to a trial on inquiry before a jury on the issue of damages. Potts v. Howser, 267 N.C. 484, 148 S.E.2d 836 (1966).

In the trial of the question of damages, the defaulting defendant has the right to be heard and participate. He may, if he can, reduce the amount of damages to nominal damages. Potts v. Howser, 267 N.C. 484, 148 S.E.2d 836 (1966).

Stated in Rich v. Norfolk Southern Ry. Co., 244 N. C. 175, 92 S. E. (2d) 768 (1956).

Cited in Pate v. R. L. Pittman Hospital, Inc., 234 N. C. 637, 68 S. E. (2d) 288 (1951); White v. Southard, 236 N. C. 367, 72 S. E. (2d) 756 (1952); Deans v. Deans, 241 N. C. 1, 84 S. E. (2d) 321 (1954).

§ 1-213. By default for defendant.—If the answer contains a statement of new matter constituting a counterclaim, and the plaintiff fails to reply or demur thereto, the defendant may move for such judgment as he is entitled to upon such statement; and if the case requires it, an order for an inquiry of damages by a jury may be made; provided, no jury will be required in small claims under

article 43A of this chapter. (C. C. P., s. 106; Code, s. 249; Rev., s. 558; C. S., s. 597; 1963, c. 468, s. 2.)

Editor's Note.—

The 1963 amendment added the proviso at the end of this section.

Cited in White v. Southard, 236 N. C. 367, 72 S. E. (2d) 756 (1952).

§ 1-214. Judgment by default where no answer filed; record; force; docket.

When Answer Has Been Filed, etc.—In accord with original. See White v. Southard, 236 N. C. 367, 72 S. E. (2d) 756 (1952).

When the clerk cannot determine whether an answer was filed before or after he signed a judgment by default, such judgment, upon proper motion in the cause, should be set aside. White v. Southard, 236 N. C. 367, 72 S. E. (2d) 756 (1952).

§ 1-217.2. Judgments by default to remove cloud from title to real estate validated.—In every case where prior to the 1st day of April, 1956, a judgment by default final has been entered by the clerk of the superior court of any county in this State in an action to remove cloud from title to real estate the said judgment is hereby to all intents and purposes validated, and said judgment is hereby declared to be regular, proper and a lawful judgment in all respects according to the provisions of same. (1961, c. 628.)

§ 1-218. Rendered in vacation.

Applied in Parmele v. Eaton, 240 N. C. 539, 83 S. E. (2d) 93 (1954).

§ 1-219. On frivolous pleading.

Cited in Morgan v. High Penn Oil Co., 236 N. C. 615, 73 S. E. (2d) 477 (1952).

§ 1-220. Mistake, surprise, excusable neglect.

I. IN GENERAL.

Editor's Note.—

For note on vacation of judgment because of surprise or excusable neglect, see 31 N. C. Law Rev. 324. For note on estoppel by judgment, see 41 N. C. Law Rev. 267.

For case law survey on trial practice, see 43 N.C.L. Rev. 938 (1965).

Section Inapplicable Where Answer Filed of Record.—No judgment by default, whether by default final or by default and inquiry, may be entered so long as answer remains filed of record, regardless of whether it was filed within time or not, and where the clerk cannot determine whether answer was filed before or der setting aside the default judgment on proper motion will be upheld. In such inafter he signed the default judgment, his orstances this section is not applicable and movant is not required to show excusable neglect and a meritorious defense. White v. Southard, 236 N. C. 367, 72 S. E. (2d) 756 (1952).

Motion Must Be Made within One Year.—A judgment may not be set aside under this section on the ground that the judgment was taken against movant through his mistake, surprise, or excusable neglect when the motion to set aside the judgment is not made until more than one year after its rendition. In re Will of Summerlin, 255 N. C. 523, 122 S. E. (2d) 55 (1961).

Excusable Neglect and Meritorious Defense.—

In accord with 1st paragraph in original. See Moore v. Deal, 239 N. C. 224, 79 S. E. (2d) 507 (1954); Greitzer v. Eastham, 254 N. C. 752, 119 S. E. (2d) 884 (1961).

In accord with 7th paragraph in original. See Pate v. R. L. Pittman Hospital, Inc., 234 N. C. 637, 68 S. E. (2d) 288 (1951); Stephens v. Childers, 236 N. C. 348, 72 S. E. (2d) 849 (1952); Sanders v. Chavis, 243 N. C. 380, 90 S. E. (2d) 749 (1956); Greitzer v. Eastham, 254 N. C. 752, 119 S. E. (2d) 884 (1961); Milks v. Clark's Greensboro, Inc., 260 N.C. 676, 133 S.E.2d 517 (1963).

The decisions of the Supreme Court are not altogether in harmony with respect to what constitutes excusable neglect. Shackleford v. Taylor, 261 N.C. 640, 135 S.E.2d 667 (1964).

When a defendant employs reputable

counsel and gives him the facts constituting his defense, and the lawyer has prepared and filed an answer, if a judgment is obtained due to the negligent failure of the attorney to appear and defend the cause when called for trial, the client may have the judgment set aside for surprise and excusable neglect within twelve months from the date of actual notice of the entry of the judgment. Gaster v. Goodwin, 263 N.C. 441, 139 S.E.2d 716 (1965).

Excusable Neglect Alone Is Insufficient.—

In accord with original. See Stephens v. Childers, 236 N. C. 348, 72 S. E. (2d) 849 (1952).

Meritorious Defense or Cause of Action Must Be Shown.—

In accord with 1st paragraph in original. See Moore v. Deal, 239 N. C. 224, 79 S. E. (2d) 507 (1954).

Same—When Defendant Non Compos Mentis.—

In accord with original. See Moore v. Superior Stone Co., 251 N. C. 69, 110 S. E. (2d) 459 (1959).

Measure of Diligence Required.—In ruling on a motion to set aside a judgment for excusable neglect, the rule is that parties who have been duly served with summons are required to give to their defense that amount of attention which a man of ordinary prudence usually gives to his important business. Pate v. R. L. Pittman Hospital, Inc., 234 N C. 637, 68 S. E. (2d) 288 (1951); Jones v. Statesville Ice & Fuel Co., Inc., 259 N. C. 206, 130 S. E. (2d) 324 (1963).

The standard of care required of the litigant is that which a man of ordinary prudence usually bestows on his important business. Moore v. Deal, 239 N. C. 224, 79 S E. (2d) 507 (1954).

Insurance Carrier's Notice of Action against Insured Immaterial. — The fact that a liability insurance carrier had received no notice, prior to judgment, of the institution and pendency of an action against its insured, was held irrelevant in determining whether the judgment should be set aside on the ground of surprise or excusable neglect. Swain v. Nationwide Ins. Co., 253 N. C. 120, 116 S. E. (2d) 482 (1960), citing Sanders v. Chavis, 243 N. C. 380, 90 S. E. (2d) 749 (1956).

Effect of Payment of Judgment. — Where defendant pays a judgment obtained against him upon inquiry after default, but pays the judgment under protest upon the advice of his attorney upon execution issued upon the judgment, such payment is involuntary and does not constitute such laches as will preclude or estop him from moving to set aside the judgment under this section. Moore v. Deal, 239 N. C. 224, 79 S. E. (2d) 507 (1954).

Applied in Jones v. Brinson, 238 N. C. 506, 78 S. E. (2d) 334 (1953); Owen v. Gates, 241 N. C. 407, 85 S. E. (2d) 340 (1955); Masters v. Dunstan, 256 N. C. 520, 124 S. E. (2d) 574 (1962), commented on in 41 N. C. Law Rev. 267.

Quoted in Chappell v. Stallings, 237 N. C. 213, 74 S. E. (2d) 624 (1953).

Cited in Rich v. Norfolk Southern Ry. Co., 244 N. C. 175, 92 S. E. (2d) 768 (1956); Carpenter v. Carpenter, 244 N. C. 286, 93 S. E. (2d) 617 (1956); Pruett v. Pruett, 247 N. C. 13, 100 S. E. (2d) 296 (1957); Grundler v. State of North Carolina, 183 F. Supp. 475 (1960); Stanley v. Brown, 261 N.C. 243, 134 S.E.2d 321 (1964); Wheeler v. Thabit, 261 N.C. 479, 135 S.E.2d 10 (1964); McDaniel v. Fordham, 264 N.C. 62, 140 S.E.2d 736 (1965).

II. THE RELIEF.

Conditions Precedent.—The conditions precedent to setting aside a judgment for surprise and excusable neglect are stated in Fellos v. Allen, 202 N. C. 375, 162 S. E. 905 (1932). Gaster v. Goodwin, 259 N. C. 676, 131 S. E. (2d) 363 (1963).

Setting Aside Abandonment of Appeal. —A judge of the superior court has authority under this section to hear a motion, made within the time allowed to serve case on appeal, to set aside an order theretofore entered in the action vacating the appeal entries and the abandonment of the appeal. State v. Grundler, 249 N. C. 399, 106 S. E. (2d) 488 (1959).

III. APPLICATION OF PRINCIPLES.

A. Neglect of Party.

Standard of Care.—A litigant does not relieve himself of all imputations of negligence under all circumstances when he employs counsel, imparts to him all the facts concerning the defenses, files answer, and then lapses into inaction, relying solely on his attorney. The standard of care a litigant must observe with respect to his case has been repeatedly stated. The least that can be expected of a person having a suit in court is that he shall give it that amount of attention which a man of ordinary prudence usually gives to his important business. Gaster v. Goodwin, 259 N. C. 676, 131 S. E. (2d) 363 (1963).

Knowledge or Notice.—Where a party knows or is chargeable with notice that

his attorney will be unable to conduct his case on account of the attorney's departure from the State, extended serious illness, mental incompetency, or death, the party's inaction will amount to inexcusable neglect. The holdings are otherwise where the attorney's illness is sudden and temporary Gaster v. Goodwin, 259 N. C. 676, 131 S. E. (2d) 363 (1963).

Under this section wife's neglect to file answer, etc.—

Findings to the effect that in an action against husband and wife arising out of business dealings between plaintiffs and the husband, the wife relied upon the husband's assurance that he would handle the matter, and that the wife had a meritorious defense to the action against her, were held sufficient to support the court's order setting aside the judgment against her for surprise and excusable neglect under this section upon her motion made within one year of the rendition of judgment. Abernethy v. Nichols, 249 N. C. 70, 105 S. E. (2d) 211 (1958).

Neglect of Agent Imputed to Principal.—Ordinarily the inexcusable neglect of a responsible agent will be imputed to the principal in a proceeding to set aside a judgment by default. Stephens v Childers, 236 N C. 348, 72 S. E (2d) 849 (1952); Greitzer v. Eastham, 254 N. C. 752 119 S. E. (2d) 884 (1961); Jones v. Statesville Ice & Fuel Co., Inc., 259 N C. 206, 130 S. E. (2d) 324 (1963); Milks v. Clark's Greensboro, Inc., 260 N.C. 676, 133 S.E.2d 517 (1963)

And Neglect of Wife Imputed to Husband.—Where the defendant turned the suit papers over to his wife, and thereafter made no inquiry as to whether or not anything had been done with respect thereto, his wife's neglect was imputable to him, and no excusable neglect was shown. Jones v. Statesville Ice & Fuel Co., Inc., 259 N. C. 206, 130 S E. (2d) 324 (1963).

Insurance Carrier's Neglect Imputed to Insured.—Where the insurance carrier has all the papers sent to it and undertakes with the knowledge and consent of insured to defendant a suit against insured, insurer is insured's responsible agent and its neglect to file answer in time will be imputed to insured, and the court's findings to the effect that insurer was guilty of neglect and that such neglect was inexcusable sustains judgment refusing to set aside the judgment by default and inquiry. Stephens v Childers, 236 N C. 348, 72 S. E (2d) 849 (1952).

Defendant's Conduct Not Judged by What Another Did.—Upon motion to set aside default judgment for surprise and excusable neglect under this section, findings of fact as to conferences between a representative of defendant's insurer and the attorney for plaintiff have no bearing upon defendant's failure to defend the action and will be set aside, since defendant's conduct must be judged by what he did and not what a person not a party to the action did. Sanders v. Chavis, 243 N. C. 380, 90 S. E. (2d) 749 (1956).

B. Neglect of Counsel.

Excusability of Neglect Is That of Litigant.—In considering the propriety of the order, entered on the hearing of defendant's motion, to vacate default judgment, the excusability of the neglect on which relief is granted is that of the litigant, not that of the attorney. The neglect of the attorney, although inexcusable, may still be cause for relief. Brown v. Hale, 259 N. C. 480, 130 S. E. (2d) 868 (1963).

Hence, neglect of attorney, although inexcusable, may still be cause for relief. Brown v. Hale, 259 N. C. 480, 130 S. E. (2d) 868 (1963).

Gross Negligence of Attorney.—

In accord with original. See Moore v. Deal, 239 N. C. 224, 79 S. E. (2d) 507 (1954).

Where Reputable Counsel Employed.—

In accord with 1st paragraph in original. See Brown v. Hale, 259 N. C. 480, 130 S. E. (2d) 868 (1963).

Where the trial court found that defendant employed a reputable attorney licensed in this State to defend the suit against him, that defendant was constantly in communication with the attorney who assured him that he was taking care of the matter, that defendant had been guilty of no neglect, but that judgment was taken against him through the inexcusable neglect of his attorney, such findings, supported by competent evidence, were held sufficient to show excusable neglect on the part of the defendant. Moore v Deal, 239 N C. 224, 79 S. E. (2d) 507 (1954).

Where defendants, served with summons and complaint, delivered the suit papers together with information concerning matters relating to their defense to their insurer, and the insurer forwarded the papers to attorneys selected by it who were reputable attorneys duly licensed to practice in the State, the neglect of the attorneys to file answer within the time limited was not imputed to the defendants and the allowance of defendant's motion under this section to set aside default judgment upon appropriate findings, including the

finding of a meritorious defense, was not disturbed on appeal. Brown v. Hale, 259 N. C. 480, 130 S. E. (2d) 868 (1963).

When an attorney is licensed to practice in a state, it is a solemn declaration that he is possessed of character and sufficient legal learning to justify a person to employ him as a lawyer. He is an officer of the court which should hold him to strict accountability for his negligence or misdeeds, if he commits such. The client is not supposed to know the technical steps of a lawsuit. Where he employs counsel and communicates the merits of his case to such counsel, and the counsel is negligent, it is excusable on the part of the client, who may reasonably rely upon the counsel's doing what may be necessary on his behalf. Brown v. Hale, 259 N. C. 480, 130 S. E. (2d) 868 (1963).

When a client has employed a reputable attorney of good standing, licensed to practice in this State, has put him in possession of the facts constituting the defense, and the lawyer has prepared and filed an answer, if a judgment is obtained for the negligent failure of the attorney to appear and defend the cause when called for trial, the client may have the judgment set aside for surprise and excusable neglect. Gaster v. Goodwin, 259 N. C. 676, 131 S. E. (2d) 363 (1963).

Where Negligence of Attorney Attributable to Party.—

If the defendant turns a legal matter over to an attorney upon the latter's assurance that he will handle the matter, and then the defendant does nothing further about it, such neglect will be inexcusable. Jones v. Statesville Ice & Fuel Co., Inc., 259 N. C. 206, 130 S. E. (2d) 324 (1963).

Where Negligence of Attorney Not Attributable to Party. — Where the negligence is that of the attorney, and the client against whom the judgment by default is taken has exercised proper care, the client is not ordinarily chargeable with the negligence of his attorney. Moore v. WOOW, Inc., 250 N. C. 695, 110 S. E. (2d) 311 (1959).

Where the failure to file an answer was due to the excusable neglect of the attorney employed in apt time by the defendants, and since the defendants made such attorney aware of their defense to the action, any failure or neglect of the attorney to file the answer could not be attributable to the defendants. Brown v. Hale, 259 N. C. 480, 130 S. E. (2d) 868 (1963).

Where a defendant engages an attorney and thereafter diligently confers with the attorney and generally tries to keep informed as to the proceedings, the negligence of the attorney will not be imputed to the defendant. Jones v. Statesville Ice & Fuel Co., Inc., 259 N. C. 206, 130 S. E. (2d) 324 (1963).

An attorney's neglect to file a plea is a surprise on the client, whose failure to examine the record to ascertain that it has been filed is an excusable neglect. Brown v. Hale, 259 N. C. 480, 130 S. E. (2d) 868 (1963).

IV. PLEADING AND PRACTICE.

Failure of Judge to State the Facts Found.—

In accord with 2nd paragraph in original. See Sprinkle v. Sprinkle, 241 N. C. 713, 86 S. E. (2d) 422 (1955).

Discretion of Judge, etc.—

Whether the facts found constitute excusable neglect is a conclusion of law reviewable on appeal. But if there is excusable neglect, whether the judge shall then set aside the judgment or not rests "in his discretion," from which an appeal lies only when there has been a clear abuse of such discretion. The discretionary power only exists when excusable neglect has been shown. State v. Grundler, 251 N. C. 177, 111 S. E. (2d) 1 (1959).

A broadside assignment of error to the court's "findings of fact and conclusions of law as set out in said judgment" brings up only the question whether the facts found support the judgment, and where the judge below found as facts that the plaintiff failed to establish either (1) mistake, surprise, inadvertence, or excusable neglect, or (2) that he had a meritorious defense within the purview of this section, these findings support the judgment. Dillingham v. Blue Ridge Motors, 234 N. C. 171, 66 S. E. (2d) 641 (1951).

Findings of Trial Court Conclusive.—

In accord with 1st paragraph in original. See Hertford Livestock & Supply Co. v. Roberson, 245 N. C. 588, 96 S. E. (2d) 734 (1957); State v. Grundler, 251 N. C. 177, 111 S. E. (2d) 1 (1959).

Findings Supporting Denial of Motion to Set Aside Default Judgment. — Where the evidence is sufficient to support the court's finding that plaintiff administrator did nothing to hinder, delay or interfere with the defendant in the defense of the action, and that defendant's failure to defend the action or notify his insurer to do so was inexcusable, the findings support the denial of defendant's motion under this section to set aside the default judgment, notwithstanding that the court's finding that the evidence of both parties tended to

show that plaintiff advised defendant to contact his insurance agent was erroneous in that only plaintiff's evidence tended to support such finding. Sanders v. Chavis, 243 N. C. 380, 90 S. E. (2d) 749 (1956).

Denial of Motion Not Res Judicata. — The fact that a motion to set aside a default judgment is denied for want of evidence of a meritorious defense is not res judicata and does not preclude a subsequent motion to set aside the default judgment on the same ground, when on the second motion movant introduces evidence of a meritorious defense which evidence was not available at the time of the hearing on the prior motion Moore v. WOOW, Inc., 250 N. C. 695, 110 S. E. (2d) 311 (1959).

§ 1-221. Stands until reversed.

A judgment regular upon the face of the record is presumed to be valid until the contrary is shown in a proper proceeding. Shaver v. Shaver, 248 N. C. 113, 102 S. E. (2d) 791 (1958).

And May Be Attacked Only by Motion of Party or Privy.—A judgment which is regular upon the face of the record but irregular in fact requires evidence aliunde for impeachment and is voidable and not void, and ordinarily may be attacked only by motion in the cause made by a party to the action or persons in privity with a party, and strangers to the judgment or intermeddlers who have no justiciable grievance should not be permitted to assail the judgment. Shaver v. Shaver, 248 N. C. 113, 102 S. E. (2d) 791 (1958).

And Trial Court May Not Initiate Proceedings on Its Own Motion.—The trial court is without power, statutory or inherent, to initiate on its own motion proceedings to vacate an irregular voidable judgment after the lapse of the term at which it was written. Shaver v. Shaver, 248 N. C. 113, 102 S. E. (2d) 791 (1958).

Quoted in D & W, Inc. v. City of Charlotte, 268 N.C. 720, 152 S.E.2d 199 (1966).

§ 1-222. For and against whom given; failure to prosecute.

A pleading should contain allegations of ultimate relevant facts, not evidential facts. Greene v. Charlotte Chemical Laboratories, Inc., 254 N. C. 680, 120 S. E. (2d) 82 (1961).

But Contract Need Not Be Set Out in Full.—Even in a suit on a contract, the contract need not be set out in full in the pleadings. Greene v. Charlotte Chemical Laboratories, Inc., 254 N. C. 680, 120 S. E. (2d) 82 (1961).

Primary and Secondary Liability.—

The entry of judgment fixing primary and secondary liability as between joint tort-feasors is sanctioned by this section. Greene v. Charlotte Chemical Laboratories, Inc., 254 N. C. 680, 120 S. E. (2d) 82 (1961).

Cross Complaint Allowed—Conformity to Original Complaint Required.—

In accord with 2nd paragraph in original. See Morgan v. Brooks, 241 N. C. 527, 85 S. E. (2d) 869 (1955); Bell v. Lacey, 248 N. C. 703, 104 S. E. (2d) 833 (1958).

Dismissal "as of Nonsuit".—

Where plaintiff fails to appear when his case is called for trial pursuant to the calendar, or refuses to go to trial after being ordered to proceed, the court can dismiss the cause "as of nonsuit" after plaintiff has been called and fails to prosecute his suit. Stanley v. Pryde W. Basinger & Co., 265 N.C. 718, 144 S.E.2d 861 (1965).

Applied in Burns v. Gulf Oil Corp., 246 N. C. 266, 98 S. E. (2d) 339 (1957).

§ 1-224. Nonsuit not allowed after verdict.

Editor's Note.—For case law survey on time for taking nonsuit, see 41 N. C. Law Rev. 526.

The Principle Stated.—

A plaintiff, in an ordinary civil action, against whom no counterclaim is asserted and no affirmative relief is demanded, may as a matter of right, take a voluntary nonsuit and get out of court at any time before verdict, and his action in so doing is not reviewable, and it is error for the court to refuse to permit him to take the voluntary nonsuit. Southeastern Fire Ins. Co. v. Walton, 256 N. C. 345, 123 S. E. (2d) 780 (1962).

A voluntary nonsuit is the act of the party and is not subject to review. Southeastern Fire Ins. Co. v. Walton, 256 N. C. 345, 123 S. E. (2d) 780 (1962).

A nonsuit is not allowed after verdict. In actions where a verdict passes against the plaintiff, judgment shall be entered against him. Southeastern Fire Ins. Co. v. Walton, 256 N. C. 345, 123 S. E. (2d) 780 (1962).

A verdict "passes" when it has been accepted by the trial judge for record. And a plaintiff may take a voluntary nonsuit at any time before the verdict is accepted and before it is made known. Southeastern

Fire Ins. Co. v. Walton, 256 N. C. 345, 123 S. E. (2d) 780 (1962).

A verdict "passes" when it has been accepted by the trial judge for record. Jordan v. Flake, 264 N.C. 362, 141 S.E.2d 486 (1965).

Acceptance by the trial judge is a prerequisite for a complete, valid and binding verdict. Southeastern Fire Ins. Co. v. Walton, 256 N. C. 345, 123 S. E. (2d) 780 (1962).

When Verdict "Accepted."—A verdict is accepted by the judge when he has inspected it and finds, or should as a matter of law find, that it is determinative of the issues involved. Southeastern Fire Ins. Co. v. Walton, 256 N. C. 345, 123 S. E. (2d) 780 (1962); Jordan v. Flake, 264 N.C. 362, 141 S.E.2d 486 (1965).

When Verdict "Made Known."—A verdict is "made known" when its contents have been seen or heard by any person or persons other than the jury serving on the case, the trial judge, and a court official or court officials acting in the presence of the judge and under his direction with respect to the verdict. Southeastern Fire Ins. Co. v. Walton, 256 N. C. 345, 123 S. E. (2d) 780 (1962).

Nonsuit after Verdict Has Been Set Aside.—Once the verdict was set aside the status of the case upon the docket was the same as if it had never been tried. Thereupon, the plaintiff had the right to enter its voluntary nonsuit. Southeastern Fire Ins Co. v. Walton, 256 N. C. 345, 123 S. E. (2d) 780 (1962).

§ 1-225. Party dying after verdict.

Judgment neither Void, etc.—

A valid judgment may be rendered in favor of a party who is dead when the judgment is entered. Collins v. R. L. Coleman & Co., 262 N.C. 478, 137 S.E.2d 803 (1964).

A judgment against a party rendered after his death is, unless saved by this section, irregular and may be vacated by motion. Page v. Miller, 252 N. C. 23, 113 S. E. (2d) 52 (1960); Collins v. R. L. Coleman & Co., 262 N.C. 478, 137 S.E.2d 803 (1964).

A judgment against one dead when the original process is issued is a mere nullity. It can bind no one. Collins v. R. L. Coleman & Co., 262 N.C. 478, 137 S.E.2d 803 (1964).

§ 1-226. When limited by demand in complaint.

And when judgment grants relief, etc.—

A default judgment rendered contrary to this section for an amount in excess of the damages alleged and the sum prayed for in the complaint is irregular. Pruitt v. Taylor, 247 N. C. 380, 100 S. E. (2d) 841 (1957).

Judgment by default must strictly conform to and be supported by the allegations of fact in the verified complaint Collins v. Simms, 254 N. C. 148, 118 S. E. (2d) 402 (1961)

Amendments Not Confessed by Defendant Who Has No Knowledge Thereof.— Amendments made either in the discretion of the court or as a right are of equal dignity. Neither are confessed by a defendant who has no knowledge thereof and, when made for the purpose of obtaining relief in excess of the amount demanded in the complaint served on defendant, come within the prohibition of this section until he has notice thereof. Pruitt v. Taylor, 247 N. C. 380, 100 S. E. (2d) 841 (1957).

§ 1-227. When passes legal title.

Consent Judgment Held Not Transfer of Title. — A consent judgment that the life tenant and remainderman under a will should execute and deliver to caveator a deed to certain lands upon payment by the caveator of the sum stipulated, does not constitute a transfer of title within the contemplation of this section and § 1-228, even though such judgment may be sufficient to support an order for specific performance in an action brought for that purpose, and the judgment does not in itself entitle caveator to an order for possession. In re Smith's Will, 249 N. C. 563, 107 S. E. (2d) 89 (1959).

§ 1-228. Regarded as a deed and registered.

Consent Judgment Held Not Transfer of Title.—See note to § 1-227.

§ 1-230. In action for recovery of personal property.

Plaintiff May Recover Both Possession of Property and Damages for Its Detention.—In a proceeding for claim and delivery of personal property a plaintiff is entitled in a single action to recover both possession of the property and damages for its detention. Bowen v. King, 146 N. C. 385, 59 S. E. 1044 (1907); Mica Industries, Inc. v. Penland, 249 N. C. 602, 107 S. E. (2d) 120 (1959).

Or after Regaining Possession He May Recover Damages in Another Action. — While plaintiff could have had his damages assessed in a former action of claim and delivery brought by him for the wrongful seizure and detention of his property under an attachment in a suit brought by defendant against another, by virtue of this section, he was not required to take this course, but, after regaining possession could, in another action, recover damages for the injury done thereby. Bowen v. King, 146 N. C. 385, 59 S. E. 1044 (1907)

Measure of Damages When Property Cannot Be Returned. — The measure of damages for the wrongful taking of a tractor-trailer which cannot be returned is the value at the time of taking by the sheriff, with interest. Tillis v. Calvine Cotton Mills, Inc., 251 N. C. 359, 111 S. E. (2d) 606 (1959)

Cited in Moore v. Humphrey, 247 N. C. 423, 101 S. E (2d) 460 (1958); General Tire & Rubber Co. v. Distributors, Inc., 253 N. C. 459, 117 S. E. (2d) 479 (1960).

§ 1-234. Where and how docketed; lien.

I. IN GENERAL.

Liens on Real Estate and Personalty Distinguished.—A judgment creditor acquires a lien on the judgment debtor's real estate by docketing. But he acquires no lien on the personalty until there has been a valid levy. Community Credit Co. of Lenoir, Inc. v. Norwood, 257 N. C. 87, 125 S. E. (2d) 369 (1962).

Stated in Dula v. Parsons, 243 N. C. 32, 89 S. E. (2d) 797 (1955).

Cited in Reid v. Bristol, 241 N. C. 699, 86 S. E. (2d) 417 (1955); Page v. Miller, 252 N. C. 23, 113 S. E. (2d) 52 (1960).

II. CREATION OF LIEN AND PRIORITIES.

A. Sufficiency.

1. Realty.

Strict Compliance with Requirement as to Docketing.—

In accord with original. See Norman Lbr. Co. v. United States, 223 F. (2d) 868 (1955).

2. Personalty.

No lien attaches to personalty by reason of the docketing of the judgment. Porter v. Citizens Bank of Warrenton, Inc., 251 N. C. 573, 111 S. E. (2d) 904 (1960).

B. Priorities.

Between Judgments.—

Where several judgments have been docketed against the same debtor subsequent to his acquisition of real property, the liens of such judgments take rank or priority with reference to such property according to the dates when such judgments were respectively docketed. Nat. Surety Corp. v Sharpe, 236 N C. 35, 72 S E (2d) 109 (1952)

Between Judgment and Attachment.—Where a judgment has become a lien on property of defendant, before the levy of an attachment on the same property, the judgment creditor will prevail over the attaching creditor. Porter v. Citizens Bank of Warrenton, Inc., 251 N. C. 573, 111 S. E. (2d) 904 (1960).

A judgment creditor who attached the personalty of his debtor is entitled to priority over a judgment creditor who did not attach such property. Porter v. Citizens Bank of Warrenton, Inc., 251 N. C. 573, 111 S. E. (2d) 904 (1960).

§ 1-237. Judgments of federal courts docketed; lien on property; recordation; conformity with federal law.

A condemnation judgment in favor of the United States need not be recorded in the county where the land lies, and cross indexed in order to protect its ownership in land that it has acquired. United States v Norman Lumber Co., 127 F Supp 518 (1955).

Whether docketing and cross indexing of federal judgments of condemnation with State court records should be required as a condition of validity as against subsequent purchasers from the condemnee is a matter for Congress, and, so far, Congress has not seen fit to take action with regard to the matter. Norman Lbr Co. v United States, 223 F. (2d) 868 (1955).

§ 1-239. Paid to clerk; docket credited; transcript to other counties; notice to attorney for judgment creditor.—(a) The party against whom a judgment for the payment of money is rendered, by any court of record, may pay the whole, or any part thereof, to the clerk of the court in which the same was rendered, at any time thereafter, although no execution has issued on such judgment; and this payment of money is good and available to the party making it, and the clerk shall enter the payment on the judgment docket of the court, and immediately forward a certificate thereof to the clerk of the superior court of each county to whom a transcript of said judgment has been sent, and the clerk of such superior court shall enter the same on the judgment docket of such court and file the original with the judgment roll in the action. Entries of payment or satisfaction on the judgment dockets in the office of the clerk of the superior court, by any person other than the clerk, shall be made in the presence of the clerk or his deputy, who shall witness the same, and when entries of full payment or satisfaction have been made, the clerk or his deputy shall enter upon the judgment index kept by him, opposite and on a line with the names of the parties to the judgment, the words "Paid" or "Satisfied."

(b) Upon receipt of any payment of money upon a judgment, the clerk of superior court shall within seven days after the receipt of such payment give notice thereof to the attorney of record for the party in whose favor the judgment was rendered, or if there is no attorney of record to the party. Any other official of any court who receives payment of money upon a judgment shall give notice in the same manner; provided further, that no such moneys shall be paid by the clerk of the superior court until at least seven days after written notice by mail or in person has been given to the attorney of record in whose favor the judgment was rendered. (1823, c. 1212, P. R.; R. C., c. 31, s. 127; Code, s. 438; Rev., s. 577; 1911, c. 76; C. S., s. 617; 1967, c. 1067.)

Editor's Note.—The 1967 amendment designated the former provisions of the section as subsection (a) and added subsection (b).

Clerk Is Agent of Owner of Judgment.—The effect of this section is to make the clerk the statutory agent of the owner of the judgment, and not of the party making the payment. Bowen v. Iowa Nat'l Mut. Ins. Co., 270 N.C. 486, 155 S.E.2d 238 (1967).

Applied in United States v. Atlantic Coast Line R. Co., 237 F. (2d) 137 (1956), aff'g 135 F. Supp. 600 (1955).

Stated in McMillan v. Robeson County, 262 N.C. 413, 137 S.E.2d 105 (1964).

Cited in Pittman v. Snedeker, 264 N.C. 55, 140 S.E.2d 740 (1965).

§ 1-240: Repealed by Session Laws 1967, c. 847, s. 2, effective January 1, 1968.

Cross Reference.—For present provisions as to contribution, see chapter 1B.

Editor's Note.—

For article on permissive joinder of parties and causes, see 34 N. C. Law Rev. 405. For note on effect of covenant not to sue, see 35 N. C. Law Rev. 141. For note on cross claim for contribution, see 40 N. C. Law Rev. 633. For comment on rights of contribution, see 41 N.C.L. Rev. 882 (1963). For comment on contribution among joint tort-feasors and rights of insurers, see 44 N.C.L. Rev. 142 (1965). For case law survey as to contribution, indemnity and settlement, see 44 N.C.L. Rev. 1051 (1966).

First and Second Paragraphs Construed Together.—The provisions now constituting the first and second paragraphs of this section are interrelated, are in pari materia, and must be considered and construed together. Shaw v. Baxley, 270 N.C. 740, 155 S.E.2d 256 (1967).

At common law, as between joint tort-feasors, there was no right of contribution. Shaw v. Baxley, 270 N.C. 740, 155 S.E.2d 256 (1967).

This section creates a new right, etc.—In accord with 1st paragraph in original. See Potter v. Frosty Morn Meats, Inc., 242 N. C. 67, 86 S. E. (2d) 780 (1955).

In accord with 2nd paragraph in original. See Hayes v. Wilmington, 239 N. C. 238, 79 S. E. (2d) 792 (1954); Bell v. Lacey, 248 N. C. 703, 104 S. E. (2d) 833 (1958); Greene v. Charlotte Chemical Laboratories, Inc., 254 N. C. 680, 120 S. E. (2d) 82 (1961).

The enactment of this statute created as to parties jointly and severally liable a

new right and ready means for the enforcement of that right. Norris v. Johnson, 246 N. C. 179, 97 S. E. (2d) 773 (1957).

The common-law rule that there is no right of contribution between joint tort-feasors has been modified in this State so as to provide for enforcement of contribution as between joint tort-feasors in the manner and to the extent provided by this section. Herring v. Jackson, 255 N. C. 537, 122 S. E. (2d) 366 (1961).

Prior to the enactment of this section one tort-feasor was, as a rule, not entitled to contribution from another. Pearsall v. Duke Power Co., 258 N. C. 639, 129 S. E. (2d) 217 (1963).

Under the rules of the common law the right of one joint tort-feasor to compel contribution from another did not exist. The common-law rule in this State was changed by the enactments now codified as this section. Nationwide Mut. Ins. Co. v. Bynum, 267 N.C. 289, 148 S.E.2d 114 (1966).

In this jurisdiction, the common-law rule has been modified by this section so as to provide for enforcement of contribution as between joint tort-feasors in accordance with its provisions. Shaw v. Baxley, 270 N.C. 740, 155 S.E.2d 256 (1967).

Intent and Purpose.—

In accord with 1st paragraph in original. See Taylor v. Kinston Free Press Co., 237 N. C. 551, 75 S. E. (2d) 528 (1953); Hobbs v. Goodman, 240 N. C. 192, 81 S. E. (2d) 413 (1954); McBryde v. Coggins-McIntosh Lumber Co., 246 N. C. 415, 98 S. E. (2d) 663 (1957).

In accord with 2nd paragraph in original See White v. Keller, 242 N. C. 97, 86 S. E. (2d) 795 (1955).

In accord with 3rd paragraph in original. See Stansel v. McIntyre, 237 N. C. 148, 74 S. E. (2d) 345 (1953); Potter v. Frosty Morn Meats, Inc., 242 N. C. 67, 86 S. E. (2d) 780 (1955); Bell v. Lacey, 248 N. C. 703, 104 S. E. (2d) 833 (1958).

The purpose of this section permitting the joinder of a third party against whom the defendant seeks contributions as joint tort-feasor, was to enable litigants in tort actions to determine in one action all matters in controversy growing out of the same subject of action. Read v. Young Roofing Co., 234 N. C. 273, 66 S. E. (2d) 821 (1951).

It is safe to assume that the General Assembly was moved to enact this legislation by the reason underlying the entire law of contribution, namely, that where one person has been compelled to pay money which others were equally bound to pay, each of the latter in good conscience should contribute the proportion which he ought to pay of the amount expended to discharge the common burden or obligation. Hunsucker v High Point Bending & Chair Co., 237 N. C. 559, 75 S. E. (2d) 768 (1953).

In substance this section provides that where two or more persons are liable for their joint tort and judgment has been rendered against some, but not all, those who pay may enforce contribution against the others who are jointly liable. Nationwide Mut. Ins. Co. v. Bynum, 267 N.C. 289, 148 S.E.2d 114 (1966).

Contribution was made the rule and not the exception by this section. Pearsall v. Duke Power Co., 258 N. C. 639, 129 S. E. (2d) 217 (1963).

Section Gives Right to Bring in Persons Not Necessary Parties. — In the single instance of this section a party is given the right to bring in others not necessary parties, i. e., the right to bring in joint obligors for contribution. Overton v. Tarkington, 249 N. C. 340, 106 S. E. (2d) 717 (1959).

But Party Sued May Also Bring Action against Joint Tort-Feasors.—The right of the party sued to have contribution from all responsible for the damage may be enforced in either of two ways. The party sued may wait until a judgment has been obtained against him, whereupon he may maintain an action against the other tort-feasors; or defendant may, in the action against him, have the other tort-feasors made parties. In either event the party called on to compensate the injured party is a plaintiff in the action against his alleged joint tort-feasors. Pearsall v. Duke Power Co., 258 N. C. 639, 129 S. E. (2d) 217 (1963).

The plaintiff himself may, at his election, sue any one or all of the tort-feasors. Clemmons v. King, 265 N.C. 199, 143 S.E.2d 83 (1965).

Without Having Perfected Appeal.— Where plaintiff has established one tort-feasor's duty to compensate her that tort-feasor, by its failure to perfect its appeal from the adjudication of its liability to plaintiff and the discharge thereof, is not thereby barred from asserting its right against another tort-feasor. Pearsall v. Duke Power Co., 258 N. C. 639, 129 S. E. (2d) 217 (1963).

Right Must Be Enforced According to Form of Section.—

In accord with original. See Potter v.

Frosty Morn Meats, Inc., 242 N. C. 67, 86 S. E. (2d) 780 (1955).

Right Is Not One of Subrogation.—The insurance carrier who pays a joint tort-feasor's obligations to the injured party cannot force contribution from other tort-feasors. This section cannot be stretched to include subrogation, which arises by reason of contract, into contribution, which arises by reason of participation in the tort. Squires v. Sorahan, 252 N. C. 589, 114 S. E. (2d) 277 (1960).

Subrogation is not included within the framework of this section. Nationwide Mut. Ins. Co. v. Bynum, 267 N.C. 289, 148 S.E.2d 114 (1966).

An automobile insurer of one joint tort-feasor after discharging in full a judgment obtained by an injured party against its insured cannot maintain in its own name an action for contribution under this section against a second joint tort-feasor whose negligence proximately caused and contributed to the injury for which the judgment was obtained where the second tort-feasor was not made a party to the original suit. The plaintiff's rights as insurer arise by contract of subrogation under its policy and not as a result of its joint liability as a tort-feasor who has paid the judgment and is entitled to force contribution under this section. Nationwide Mut. Ins. Co. v. Bynum, 267 N.C. 289, 148 S.E.2d 114 (1966).

But Is Right of Contribution. — The right permitted to be enforced under this section is one of contribution and not one of subrogation. Nationwide Mut. Ins. Co. v. Bynum, 267 N.C. 289, 148 S.E.2d 114 (1966).

It Is Not Dependent on Plaintiff's Continued Right to Sue.—In accord with original. See White v. Keller, 242 N. C. 97, 86 S. E. (2d) 795 (1955).

There is no right of indemnity by virtue of this section. It provides only for contribution as between tort-feasors who are in pari delicto with respect to the same injury. Ingram v. Nationwide Mut. Ins. Co., 258 N. C. 632, 129 S. E. (2d) 222 (1963).

Such as Existed between Tort-Feasors Secondarily and Primarily Liable. — Before this section was enacted it was settled law that a tort feasor whose liability was secondary, upon payment by him of the injured party's recovery was entitled to indemnity against the primary wrongdoer. Ingram v. Nationwide Mut. Ins. Co., 258 N. C. 632 129 S. E. (2d) 222 (1963).

Independently of this section, the law permits an adjudication in one action of primary and secondary liability between joint tort-feasors who are not in pari delicto. A defendant secondarily liable, when sued alone, may have the tort-feasor primarily liable brought into the action by alleging a cross action for indemnification against him. Edwards v. Hamill, 262 N.C. 528, 138 S.E.2d 151 (1964).

Liability for contribution under this section cannot be invoked except among joint tort-feasors. Lovette v Lloyd, 236 N. C. 663, 73 S. E. (2d) 886 (1953); Wise v. Vincent, 265 N.C. 647, 144 S.E.2d 877 (1965).

There can be no contribution unless the parties are joint tort-feasors. Pearsall v. Duke Power Co., 258 N C. 639, 129 S. E. (2d) 217 (1963).

In order for one defendant to join another as additional defendant for the purpose of contribution he must show by his allegations facts sufficient to make them both liable to the plaintiff as joint tort-feasors, and allegations showing only a cause of action which would entitle the plaintiff to recover of such additional party are not sufficient. Hayes v. Wilmington, 239 N. C. 238, 79 S. E. (2d) 792 (1954); Hayes v. Wilmington, 243 N. C. 525, 91 S. E. (2d) 673 (1956).

In order for one defendant to join another as a third-party defendant for the purpose of contribution, he must allege facts sufficient to show joint tort-feasorship and his right to contribution in the event plaintiff recovers against him. Clemmons v. King, 265 N.C. 199, 143 S.E.2d 83 (1965); Wise v. Vincent, 265 N.C. 647, 144 S.E.2d 877 (1965).

In order to show joint tort-feasorship, it is necessary that the facts alleged in the cross complaint be sufficient to make the third party liable to the plaintiff along with the cross-complaining defendant in the event of a recovery by the plaintiff against him. Clemmons v. King, 265 N.C. 199, 143 S.E.2d 83 (1965); Wise v. Vincent, 265 N.C. 647, 144 S.E.2d 877 (1965).

An original defendant may not invoke the statutory right of contribution against another party in a tort action unless both parties are liable as joint tort-feasors to the plaintiff in the action. Clemmons v. King, 265 N.C. 199, 143 S.E.2d 83 (1965).

Where the insureds were adjudged to be joint tort-feasors and judgments were rendered against them, they are within the specific provisions of this section. Nationwide Mut. Ins. Co. v. Bynum, 267 N.C. 289, 148 S.E.2d 114 (1966).

Or Joint Judgment Debtors.—Joint tort-feasors and joint judgment debtors are

given the right to contribution. Nationwide Mut. Ins. Co. v. Bynum, 267 N.C. 289, 148 S.E.2d 114 (1966).

When Additional Defendant Entitled to Motion for Nonsuit.—For the failure of original defendant to allege and to offer any evidence tending to show that joint and concurring negligence on the part of herself and additional defendant proximately caused injury to plaintiff, additional defendant's motion for judgment of nonsuit should have been sustained. Clemmons v. King, 265 N.C. 199, 143 S.E.2d 83 (1965).

Enforcement of Right, etc.—

The provisions now constituting the second paragraph of this section, relating to a determination of proportionate liabilities, do not apply unless and until one of the judgment debtors pays the amount thereof and has the judgment assigned to a trustee for his benefit. Only when this has been done may such judgment debtor seek a determination, under conditions then existing, of the amount due him by other judgment debtors. Shaw v. Baxley, 270 N.C. 740, 155 S.E.2d 256 (1967).

Consent Judgment in Foreign Action Is Binding.—While this section makes no reference to consent judgments, it cannot successfully be contended that a consent judgment in a foreign action, based upon an automobile accident within this State, is not binding upon the parties thereto in the absence of fraud. Carolina Coach Co. v. Cox, 337 F.2d 101 (4th Cir. 1964).

Contribution between Joint Tort-Feasors.—

In accord with original. See Hayes v. Wilmington, 239 N. C. 238, 79 S. E. (2d) 792 (1954).

In order to maintain a cross action against another for contribution under this section, the original defendant must allege facts sufficient to show that both of them are liable to the plaintiff as joint tort-feasors. Potter v. Frosty Morn Meats, Inc., 242 N. C. 67, 86 S. E. (2d) 780 (1955).

When a defendant in a negligent injury action files answer denying negligence but alleging, conditionally or in the alternative, that if he were negligent, a third party also was negligent and that the negligence of such third party concurred in causing the injury in suit, the defendant is entitled, on demand for relief by way of contribution, to have such third person joined as a codefendant under this section. Hayes v. Wilmington, 243 N. C. 525, 91 S. E. (2d) 673 (1956).

The right of contribution is a personal right. Pittman v. Snedeker, 264 N.C. 55, 140 S.E.2d 740 (1965).

And Cannot Be Assigned or Transferred.—The right of contribution is not one that can be assigned or transferred by operation of law under the doctrine of subrogation. Pittman v. Snedeker, 264 N.C. 55, 140 S.E.2d 740 (1965).

A defendant may not exculpate himself from liability for his negligence in a tort case by showing that a codefendant was also negligent. Byerly v. Shell, 312 F. (2d) 141 (1962).

But He Need Not Make Judicial Admission of Negligence in Order to Interplead Third Party for Contribution.—To interplead a third party for contribution the law does not require a defendant in a personal-injury suit to make a judicial admission that his negligence was one of the proximate causes of the injury for which plaintiff sues. He may deny negligence and allege, conditionally or alternatively, that if he was negligent, the third party's negligence concurred with his as a proximate cause of plaintiff's injuries. Clemmons v. King, 265 N.C. 199, 143 S.E.2d 83 (1965).

Plaintiff Cannot Be Compelled to Sue Joint Tort-Feasors.—

In accord with original. See Hayes v. Wilmington, 239 N. C. 238, 79 S. E. (2d) 792 (1954); Bell v. Lacey, 248 N. C. 703, 104 S. E. (2d) 833 (1958); Greene v. Charlotte Chemical Laboratories, Inc., 254 N. C. 680, 120 S. E. (2d) 82 (1961).

A defendant sued in tort cannot compel plaintiff to sue all responsible for the damage, but the party sued may have contribution from all responsible for the damage. Pearsall v. Duke Power Co., 258 N. C. 639, 129 S. E. (2d) 217 (1963).

This section made no attempt to interfere with the right of the injured party to decide who would be called on for compensation. Pearsall v. Duke Power Co., 258 N. C. 639, 129 S. E. (2d) 217 (1963).

When a person has been injured through the concurring negligence of two or more persons, he may sue one or all the joint tort-feasors at his option. In so far as he is concerned, the others are not necessary parties and he may not be compelled to bring them in. They may, however, be brought in by the original defendant on a cross complaint in which he alleges joint tort-feasorship and his right to contribution in the event plaintiff recovers judgment against him. Hayes v. Wilmington, 239 N. C. 238, 79 S. E. (2d) 792 (1954).

Second Provision Not Applicable Where Plaintiff Sues All Joint Tort-Feasors.—The second provision of this section is designed for the protection of the defendant or defendants in a case where plaintiff elects to sue some, but not all, of the alleged joint tort-feasors, and is not applicable when plaintiff sues all of them. Thus where plaintiff sues both the joint tort-feasors and the complaint fails to state a cause of action against one of them, the other has no right to insist that the first be retained in the action for the purpose of enforcing contribution. Loving v. Whitton, 241 N. C. 273, 84 S. E. (2d) 919 (1954).

Neither Joint Tort-Feasor May Preclude Dismissal of Action against the Other.—Where plaintiff elects to sue both joint tort-feasors and alleges active negligence on the part of both which concurred in producing the injury, each is entitled to contribution from the other if there is a judgment of joint and several liability against them, but during the course of the trial each is a defendant as to the plaintiff only, and neither may preclude the dismissal of the action against the other if plaintiff fails to make out a prima facie case against the other, and allegations and prayer for contribution contained in the answer of one are properly stricken on motion to the other. Greene v. Charlotte Chemical Laboratories, Inc., 254 N. C. 680, 120 S. E. (2d) 82 (1961).

Unless Plaintiff Makes Out Prima Facie Case.—Where the plaintiff had made out a prima facie case against both defendants, the dismissal of other defendants was improper since this prevented the co-defendants from pressing their claim for contribution. Byerly v. Shell, 312 F. (2d) 141 (1962).

Section Does Not Apply to Insurers of Tort-Feasors.—

In accord with 2nd paragraph in original. See Squires v. Sorahan, 252 N. C. 589, 114 S. E. (2d) 277 (1960).

An insurer paying the judgment obtained by the injured party against one tort-feasor has no right of action to enforce contribution against the other tort-feasor and cannot acquire such right of action by the device of a "loan" to the injured party payable only in the event and to the extent of any recovery which the injured party may obtain against the other tort-feasor and in an action for contribution in the name of the injured party, maintained solely in the interest of the insurer, the injured party is not a real party in interest. Herring v. Jackson, 255 N. C. 537, 122 S. E. (2d) 366 (1961).

Payment of Judgment by Insurer Does Not Affect Original Defendant's Right to Contribution.—Where insurer of original defendant pays plaintiff's judgment against its insured and plaintiff's judgment is marked paid and satisfied, the original defendant's right to contribution from another defendant is not affected and the insurer is entitled to enforce his claim. Pittman v. Snedeker, 264 N.C. 55, 140 S.E.2d 740 (1965).

Defendants May File Cross Action, etc.—

In accord with 2nd paragraph in original. See Hayes v. Wilmington, 243 N. C. 525, 91 S. E. (2d) 673 (1956); Denny v. Coleman, 245 N. C. 90, 95 S. E. (2d) 352 (1956); Wise v. Vincent, 265 N.C. 647, 144 S.E.2d 877 (1965).

When one joint tort-feasor is sued alone he may join other joint tort-feasors for contribution under this statute without permission from the original plaintiff. Norris v. Johnson, 246 N. C. 179, 97 S. E. (2d) 773 (1957); McBryde v. Coggins-McIntosh Lumber Co., 246 N. C. 415, 98 S. E. (2d) 663 (1957).

When the aggrieved party elects to sue only one, or less than all the tort-feasors, the original defendant or defendants may have the others made additional defendants under this section for the purpose of enforcing contribution in the event the plaintiff recovers. Phillips v. Hassett Min. Co., 244 N. C. 17, 92 S. E. (2d) 429 (1956).

In an action by property owner to recover damages from mining company due to dumping of silt in river in its mining operations, the defendant could file a cross complaint for contribution against two other mining companies committing the same injurious acts in their operations. Phillips v. Hassett Min. Co., 244 N. C. 17, 92 S. E. (2d) 429 (1956).

Where two alleged tort-feasors are sued by the injured party, one may set up a cross action against the other for indemnity, under the doctrine of primary-secondary liability, and have the matter adjudicated in that action. Steele v. Moore-Flesher Hauling Co., 260 N.C. 486, 133 S.E.2d 197 (1963).

Original Defendant Becomes a Plaintiff as to Additional Defendant. — Where a plaintiff does not bring his action against all joint tort-feasors, and an original defendant sets up a cross-action against a third party and has him brought in as an additional party defendant, under the pro-

visions of this section, for contribution, such original defendant makes himself a plaintiff as to the additional party defendant. Bell v. Lacey, 248 N. C. 703, 104 S. E. (2d) 833 (1958); Greene v. Charlotte Chemical Laboratories, Inc., 254 N. C. 680, 120 S. E. (2d) 82 (1961).

When an injured party elects to sue some but not all of the tort-feasors responsible for his injuries, those sued have a right to bring the other wrongdoers in for contribution. The original defendant then becomes as to the tort-feasors not sued a plaintiff. Etheridge v. Carolina Power & Light Co., 249 N. C. 367, 106 S. E. (2d) 560 (1959); Cox v. E. I. DuPont de Nemours & Co., 269 F. Supp. 176 (D.S.C. 1967).

Additional Party under No Obligation to Answer Allegations in Original Complaint.—An additional party defendant has no cause of action stated against him except that asserted in the cross-action and set out in the cross-complaint. Hence, the additional party defendant is under no obligation to answer any allegations in the original complaint, but only those alleged against him in the cross-complaint. Greene v. Charlotte Chemical Laboratories, Inc., 254 N. C. 680, 120 S. E. (2d) 82 (1961).

Contribution Is Based upon Liability as Joint Tort-Feasor. — In an action for wrongful death instituted by the administrator of a deceased unemancipated child against the driver of the car inflicting the fatal injury, defendant is not entitled to have the child's mother joined as a party defendant for the purpose of contribution or indemnity upon allegations that the child's mother was negligent in permitting the child to enter upon the highway unattended, since the mother cannot be liable to the plaintiff as a joint tort-feasor, and the statutory right of contribution and the right to indemnity on the ground of primary and secondary liability are both based upon the liability of a joint tort-feasor. Lewis v. Farm Bureau Mut. Auto. Ins. Co., 243 N. C. 55, 89 S. E. (2d) 788 (1955).

Since an unemancipated infant who is a member of the household cannot maintain an action for negligence against his parents, in an action on behalf of an unemancipated child to recover for negligent injury, the defendants may not file a cross action against the plaintiff's parents for contribution under this section because such cross action would indirectly hold the unemancipated minor's parents liable to him for the injury. Watson v. Nichols, 270 N.C. 733, 155 S.E.2d 154 (1967).

Section Does Not Contemplate That Additional Defendant Shall Pay More Than Pro Rata Share.—This section does not contemplate that one brought in as an additional defendant shall pay more than a pro rata part of any verdict rendered against the original defendants. Jordan v. Blackwelder, 250 N. C. 189, 108 S. E. (2d) 429 (1959).

When Too Late to Bring in Other Joint Tort-Feasors. — When joint tort-feasors, who have been sued in an action, fail to file an answer to a complaint that states a good cause of action, and the plaintiffs obtain a judgment by default and inquiry, which is regular in all respects, a motion, lodged thereafter, to bring in other joint tort-feasors so as to determine liability for contribution as between themselves, comes too late. Denny v. Coleman, 245 N. C. 90, 95 S. E. (2d) 352 (1956).

Interjecting Action Not Germane.—The cross action for contribution between defendants charged with tort may not be used, however, to interject into the litigation another action not germane to the plaintiff's action. White v. Keller, 242 N. C. 97, 86 S. E. (2d) 795 (1955).

Facts Must Be Such That Plaintiff Could Have Joined Third Party as Defendant.—To entitle the original defendant in a tort action to have some third party made an additional party defendant under this section to enforce contribution, it must be made to appear from the facts alleged in the cross action that the defendant and such third person are tort-feasors in respect to the subject of controversy, jointly liable to the plaintiff for the particular wrong alleged in the complaint. The facts must be such that the plaintiff, had he desired so to do, could have joined such third party as defendant in the action. Hobbs v. Goodman, 240 N. C. 192, 81 S. E. (2d) 413 (1954). See Hobbs v. Goodman, 241 N. C. 297, 84 S. E. (2d) 904 (1954); Hayes v. Wilmington, 243 N. C. 525, 91 S. E. (2d) 673 (1956); Johnson v. Catlett, 246 N. C. 341, 98 S. E. (2d) 458 (1957); Jones v. Douglas Aircraft Co., 253 N. C. 482, 117 S. E. (2d) 496 (1960).

A defendant who has been sued for tort may bring into the action for the purpose of enforcing contribution under this section only a joint tort-feasor whom plaintiff could have sued originally in the same action. Petrea v. Ryder Tank Lines, Inc., 264 N.C. 230, 141 S.E.2d 278 (1965).

The allegations of the cross complaint must be so related to the subject matter declared on in the plaintiff's complaint as to disclose that the plaintiff, had he desired

to do so, could have joined the third party as a defendant in the action. Wise v. Vincent, 265 N.C. 647, 144 S.E.2d 877 (1965).

Burden Is on Original Defendant, etc.— In accord with original. See Stansel v. McIntyre, 237 N. C. 148, 74 S. E. (2d) 345 (1953).

Where one joint tort-feasor has others joined for contribution, he is, as to the new defendants, a plaintiff and must establish his right of action, and such additional defendants may assert any appropriate defense to the cross action without regard to relevancy to the claim of plaintiff. Norris v. Johnson, 246 N. C. 179, 97 S. E. (2d) 773 (1957).

Lessees Not Entitled to Join Lessor on Principle of Primary and Secondary Liability.—Where plaintiff sued to recover for injuries sustained when a sign erected over a sidewalk by lessees fell and struck her, lessees were not entitled to join the lessor as a party defendant on the principle of primary and secondary liability, since upon the cause as set out in the complaint, lessees' active negligence created the situation which caused the injury, and therefore lessees were primarily liable. Hobbs v. Goodman, 240 N. C. 192, 81 S. E. (2d) 413 (1954)

Newspaper May Bring in Individual Author of Libelous Matter.—Where plaintiff sues a newspaper alone for alleged libel, the newspaper, upon allegations that an individual composed the libelous matter and had it published as a paid advertisement, is entitled to have such individual joined as a joint tort-feasor for the purpose of contribution under this section, and such individual's demurrer to the cross-action of the newspaper against him is properly overruled. Taylor v. Kinston Free Press Co., 237 N. C. 551, 75 S. E. (2d) 528 (1953)

Additional Defendant May File Counterclaim Against Original Defendant.—Where the original defendant has another joined as additional defendant for contribution on the ground of their concurring negligence in producing plaintiff's injury, the additional defendant may file a counterclaim against the original defendant for damages to the additional defendant's property allegedly resulting from the negligence of the original defendant, and such counterclaim is improperly stricken upon motion of the original defendant. Norris v. Johnson, 246 N. C. 179, 97 S. E. (2d) 773 (1957).

The party brought in may assert any defense appropriate to the cause of action asserted against him. He may plead estoppel by settlement or a judgment binding the parties. Norris v. Johnson, 246 N. C. 179, 97 S. E. (2d) 773 (1957).

Improper Joinder.—

When an alleged joint tort-feasor is brought into a case as an additional party defendant, and it turns out that no cause of action is stated against him, either in the main action or in a cross action pleaded by another defendant, he is an unnecessary party to the action and, on motion, may have his name stricken from the record as mere surplusage. Hayes v. Wilmington, 243 N. C. 525, 91 S. E. (2d) 673 (1956).

The pleading filed by the original defendant must state facts which are sufficient to show that the original defendant is entitled to contribution from the additional defendant under this section. If the facts alleged do not suffice to establish a right to contribution, the party or parties brought in as additional defendants are unnecessary parties and may on motion have the allegations stricken and the action dismissed as to them. The motion is in effect a demurrer for failure to state a cause of action under § 1-127. Etheridge v. Carolina Power & Light Co., 249 N. C. 367, 106 S. E. (2d) 560 (1959).

Effect of Workmen's Compensation Act.—In an action against a third person tort-feasor by an employee, subject to the Workmen's Compensation Act, the defendant is not entitled to join the employer or the insurance carrier for contribution or to set up the defense that its liability is secondary and that of the employer primary. Lovette v. Lloyd, 236 N. C. 663, 73 S. E. (2d) 886 (1953); Johnson v. Catlett, 246 N. C. 341, 98 S. E. (2d) 458 (1957).

Where a third person tort-feasor is sued for the wrongful death of an employee, he is not entitled to have the employer joined as a joint tort-feasor under this section, nor as a necessary party to the determination of the action when the original defendant does not rely upon the doctrine of primary and secondary liability. Clark v. Pilot Freight Carriers, Inc., 247 N. C. 705, 102 S. E. (2d) 252 (1958); Jones v. Douglas Aircraft Co., 253 N. C. 482, 117 S. E. (2d) 496 (1960).

Where the personal representative of a deceased employee sued a third person tort-feasor in an action instituted in this State, and defendant had the employer and a fellow employee of the deceased employee joined for contribution, motions of the additional defendants to strike the cross-action were properly allowed where

it appeared that the deceased was employed in another State, that the injury came within the purview of the Compensation Act of such State, and that award had been entered therein adjudicating the liabilities of the additional defendants for the death. Johnson v. Catlett, 246 N. C. 341, 98 S. E. (2d) 458 (1957).

Effect of Settlement.—While the passengers, by making settlement with one joint tort-feasor, waived any right they might have possessed to seek compensation from the other, the tort-feasor making settlement with them waived no right it possessed to assert its claim to contribution against the other alleged joint tort-feasor in an action by a passenger with whom no settlement has been made. Snyder v. Kenan Oil Co., 235 N. C. 119, 68 S. E. (2d) 805 (1952).

Allegations Sufficient to State Cause of Action against Joint Tort-Feasor for Contribution.—See Read v. Young Roofing Co., 234 N. C. 273, 66 S. E. (2d) 821 (1951).

Where cross complaint was insufficient to allege facts tending to show that the negligence of the other defendants concurred in proximately causing the injury in suit, the demurrer of such defendants was properly sustained. Potter v. Frosty Morn Meats, Inc., 242 N. C. 67, 86 S. E. (2d) 780 (1955).

Procedure for Contribution between Defendants.- The procedure to be followed in this State, when the right of contribution between defendants is claimed, seems to be set forth in Whiteman v. Seashore Transp. Co., 231 N. C. 701, 58 S. E. (2d) 752 (1950). Byerly v. Shell, 312 F. (2d) 141 (1962).

Joint and Several Judgment, etc.—

In accord with original. See Shaw v. Eaves, 262 N.C. 656, 138 S.E.2d 520 (1964).

Res Judicata.—

Where the initial action is instituted by the passenger in one vehicle against the driver of the other vehicle, in which the passenger's driver is joined for contribution, adjudication that the passenger's driver was not guilty of negligence constituting a proximate cause of the accident, is res judicata in a subsequent action between the drivers. It is equally true in such a factual situation where the plaintiff recovers judgment against the original defendant and the jury finds the additional defendant guilty of negligence and that such negligence concurred in jointly and proximately causing plaintiff's injuries and gives the original defendant a verdict for contribution pursuant to the provisions of this section, such judgment is res judicata in a subsequent action between such drivers, based on the same facts litigated in the cross action in the former trial. Hill v. Edwards 255 N. C. 615, 122 S. E. (2d) 383 (1961); Sisk v. Perkins, 264 N.C. 43, 140 S.E.2d 753 (1965).

Applied in McAbee v. Love, 238 N. C. 560, 78 S. E. (2d) 405 (1953); Yandell v. National Fireproofing Corp., 239 N. C. 1, 79 S. E. (2d) 223 (1953); Thompson v. Lassiter, 246 N. C. 34, 97 S. E. (2d) 492 (1957); Riddle v. Wilde, 248 N. C. 210, 102 S. E. (2d) 769 (1958); Clontz v. Krimminger, 253 N. C. 252, 116 S. E. (2d) 804 (1960); Johnson v. Bass, 256 N. C. 716, 125 S. E. (2d) 19 (1962); Cowart v. Honeycutt, 257 N. C. 136, 125 S. E. (2d) 382 (1962); Hamilton v. McCash, 257 N. C. 611, 127 S. E. (2d) 214 (1962); Salter v. Lovick, 257 N. C. 619, 127 S. E. (2d) 273 (1962); Williams v. Hunter, 257 N. C. 754, 127 S. E. (2d) 546 (1962); Dellinger v. Bridges, 259 N. C. 90, 130 S. E. (2d) 19 (1963); Pittman v. Snedeker, 261 N.C. 365, 134 S.E.2d 622 (1964); Gowens v. Morgan & Sons Poultry Co., 238 F. Supp. 399 (M.D.N.C. 1964); Nicholson v. Dean, 267 N.C. 375, 148 S.E.2d 247 (1966); Stutts v. Burcham, 271 N.C. 176, 155 S.E.2d 742 (1967).

Cited in Herring v. Queen City Coach Co., 234 N. C. 51, 65 S. E. (2d) 505 (1951); Barber v. Wooten, 234 N. C. 107, 66 S. E. (2d) 699 (1951); Warner v. Leder, 234 N. C. 727, 69 S. E. (2d) 6 (1952); Kimsey v. Reaves, 242 N. C. 721, 89 S. E. (2d) 386 (1955); Dosher v. Hunt, 243 N. C. 247, 90 S. E. (2d) 374 (1955); Harris v. Carolina Power & Light Co., 243 N. C. 438, 90 S. E. (2d) 694 (1956); Hannah v. Hanse, 247 N. C. 573, 101 S. E. (2d) 357 (1958); Cannon v. Parker, 249 N. C. 279, 106 S. E. (2d) 229 (1958); Demoret v. Lowery, 252 N. C. 187, 113 S. E. (2d) 199 (1960); Stockwell v. Brown, 254 N. C. 662, 119 S. E. (2d) 795 (1961); Bass v. Lee, 255 N. C. 73, 120 S. E. (2d) 570 (1961); Manning v. Hart, 255 N. C. 368, 121 S. E. (2d) 721 (1961); Black v. Penland 255 N. C. 691, 122 S. E. (2d) 504 (1961); Hall v. Poteat, 257 N. C. 458, 125 S. E. (2d) 924 (1962); Parnell v. Nationwide Mut. Ins. Co., 263 N.C. 445, 139 S.E.2d 723 (1965); Sell v. Hotchkiss, 264 N.C. 185, 141 S.E.2d 259 (1965); Safeco Ins. Co. of America v. Nationwide Mut. Ins. Co., 264 N.C. 749, 142 S.E.2d 694 (1965); Faisor v. T & S Trucking Co., 266 N.C. 383, 146 S.E.2d 450 (1966); Potts v. Howser, 267 N.C. 484, 148 S.E.2d 836 (1966).

§ 1-241. Clerk to pay money to party entitled.

The duty to receive carries with it the duty to pay the sums collected to the parties entitled thereto. McMillan v. Robeson County, 262 N.C. 413, 137 S.E.2d 105 (1964).

Applied in United States v. Atlantic Coast Line R. Co., 135 F Supp 600 (1955), aff'd in 237 F. (2d) 137 (1956).

§ 1-242. Credits upon judgments.

Amount Paid Plaintiff on Covenant Not to Sue as Credit.—

In accord with original. See Ramsey v. Camp, 254 N. C. 443, 119 S. E. (2d) 209 (1961).

ARTICLE 24.

Confession of Judgment.

§ 1-247. When and for what.

Editor's Note.—

For note as to consent judgments for alimony, see 35 N. C. Law Rev. 405.

Distinction between Attack on Judgment by Creditors of Debtor and by Debtor Himself.—There is a distinction between challenges to the validity of a confessed judgment made by creditors of the confessing debtor, and by the debtor himself. Pulley v. Pulley, 255 N. C. 423, 121 S. E. (2d) 876 (1961).

Defendant was estopped to question the validity of his own confessed judgment for alimony. See Pulley v Pulley, 255 N. C. 423, 121 S. E. (2d) 876 (1961).

§ 1-248. Debtor to make verified statement.

Quoted in Pulley v. Pulley, 255 N. C. 423, 121 S. E. (2d) 876 (1961).

ARTICLE 25.

Submission of Controversy without Action.

§ 1-250. Submission, affidavit, and judgment.

Stipulated Facts Must Present Controversy Which Could Be Litigated.—"The subject of a civil action" as used in this section is a cause of action. The stipulated facts must present a controversy which could be litigated and upon which the court could enter judgment in an action pending. In adopting this section, the legislature did not intend to confer jurisdiction on the courts to render advisory opinions. Bragg Development Co. v Braxton, 239 N. C. 427, 79 S. E. (2d) 918 (1954)

Court Has No Authority to Consider Evidence and Find Additional Facts.—Upon submission of a controversy without action under this section, the cause is for determination on the agreed facts. The court is without authority to consider evidence and find additional facts. This rule applies when the facts are stipulated. Greensboro v. Wall, 247 N. C. 516, 101 S. E. (2d) 413 (1958).

Conflict between Agreed Statement of Facts and Exhibit. — Where there was a conflict between the agreed statement of facts and an exhibit in an action submitted under this section, the cause was remanded for further proceedings. Southeastern Baptist Theological Seminary, Inc. v. Wake County, 248 N. C. 420, 103 S. E. (2d) 472 (1958).

Same—Taxes.—

This section is not available as a means of determining plaintiff's tax liability to a defendant county where no assessment or levy has been made and no attempt to collect a tax on the property involved has been undertaken. Bragg Development Co. v. Braxton, 239 N. C. 427, 79 S. E. (2d) 918 (1954).

Parties.—

In accord with original. See Peel v. Moore, 244 N. C. 512, 94 S. E. (2d) 491 (1956).

The sufficiency of a deed to convey title can be adjudicated by the submission of a controversy without action under this section Griffin v. Springer, 244 N C. 95, 92 S. E. (2d) 682 (1956); Peel v Moore, 244 N. C. 512, 94 S. E. (2d) 491 (1956).

Applied in Resort Develop. Co. v Parmele, 235 N. C. 689, 71 S. E. (2d) 474 (1952); Whitson v Barnett, 237 N. C. 483, 75 S. E. (2d) 391 (1953); Marks v. Thomas, 238 N. C. 544, 78 S. E. (2d) 340 (1953); Spaugh v Charlotte, 239 N. C. 149, 79 S. E. (2d) 748 (1954); Clayton v. Burch, 239 N. C. 386, 80 S. E. (2d) 29 (1954); Bragg Development Co. v Braxton, 239 N. C. 427, 79 S. E. (2d) 918 (1954); Taylor v. Honeycutt, 240 N. C. 105, 81 S. E. (2d) 203 (1954); Pilkington v. West, 246 N. C. 575, 99 S. E. (2d) 798 (1957); Weyerhaeuser Co. v. Carolina Power & Light Co., 257 N. C. 717, 127 S. E. (2d) 539 (1962).

Cited in Jones v. Callahan, 242 N. C. 566, 89 S. E. (2d) 111 (1955); Brown v. Cowper, 247 N. C. 1, 100 S. E. (2d) 305 (1957); Ahoskie Production Credit Ass'n v. Whedbee, 251 N. C. 24, 110 S. E. (2d) 795 (1959); Southeastern Baptist Theological Seminary, Inc. v. Wake County, 251 N. C. 775, 112 S. E. (2d) 528 (1960); Swartzberg v. Reserve Life Ins. Co., 252 N. C. 150, 113 S. E. (2d) 270 (1960); Rural Plumbing & Heating, Inc. v. H. C. Jones Constr. Co., 268 N.C. 23, 149 S.E.2d 625 (1966).

Article 26.

Declaratory Judgments.

§ 1-253. Courts of record permitted to enter declaratory judgments of rights status and other legal relations.

Cross Reference.—See note to § 118-18

In General.—

In accord with 1st paragraph in original. See Branch Banking & Trust Co. v Whitfield, 238 N. C. 69, 76 S. E. (2d) 334 (1953); Nascar, Inc. v. Blevins, 242 N. C. 282, 87 S. E. (2d) 490 (1955).

The Declaratory Judgment Act is designed to provide an expeditious method of procuring a judicial decree construing wills, contracts, and other written instruments and declaring the rights and liabilities of parties thereunder. It is not a vehicle for the nullification of such instruments. Nor is it a substitute or alternate method of contesting the validity of wills. Farthing v Farthing, 235 N. C. 634, 70 S. E. (2d) 664 (1952); Bennett v. Attorney General, 245 N. C. 312, 96 S. E. (2d) 46 (1957).

The purpose of the Declaratory Judgment Act is to settle and afford relief from uncertainty and insecurity, with respect to rights, status, and other legal relations. Nationwide Mut. Ins. Co. v. Roberts, 261 N.C. 285, 134 S.E.2d 654 (1964).

The courts have no jurisdiction to determine matters purely speculative, enter anticipatory judgments, declare social status, deal with theoretical problems, give advisory opinions, answer moot questions, adjudicate academic matters, provide for contingencies which may hereafter arise, or give abstract opinions. Little v. Wachovia Bank & Trust Co., 252 N. C. 229, 113 S. E. (2d) 689 (1960).

The Uniform Declaratory Judgment Act does not undertake to convert judicial tribunals into counsellors and impose upon them the duty of giving advisory opinions to any parties who may come into court and ask for either academic enlightenment or practical guidance concerning their legal affairs. Lide v. Mears, 231 N.C. 111, 56 S.E.2d 404 (1949); Angell v. City of Raleigh, 267 N.C. 387, 148 S.E.2d 233 (1966).

The Uniform Declaratory Judgment Act does not license litigants to fish in judicial ponds for legal advice. Lide v. Mears, 231 N.C. 111, 56 S.E.2d 404 (1949); Angell v. City of Raleigh, 267 N.C. 387, 148 S.E.2d 233 (1966).

This article does not authorize the adjudication of mere abstract or theoretical questions. Angell v. City of Raleigh, 267 N.C. 387, 148 S.E.2d 233 (1966).

The Declaratory Judgment Act is to be liberally construed and administered. Nationwide Mut. Ins. Co. v. Roberts, 261 N.C. 285, 134 S.E.2d 654 (1964).

Specific Reference to Statute Not Required.—It is not error if an action instituted under this section fails to make specific reference to the statute in the complaint. It is the facts alleged that determine the nature of the relief to be granted. Little v. Wachovia Bank & Trust Co., 252 N. C. 229, 113 S. E. (2d) 689 (1960).

Necessity for a Controversy.—

An action for a declaratory judgment will lie only in a case in which there is an actual or real existing controversy between parties having adverse interests in the matter in dispute. Lide v. Mears, 231 N.C. 111, 56 S.E.2d 404 (1949); Angell v. City of Raleigh, 267 N.C. 387, 148 S.E.2d 233 (1966).

While the Uniform Declaratory Judgment Act enables courts to take cognizance of disputes at an earlier stage than that ordinarily permitted by the legal procedure which existed before its enactment, it preserves inviolate the ancient and sound juridic concept that the inherent function of judicial tribunals is to adjudicate genuine controversies between antagonistic litigants with respect to their rights, status, or other legal relations. Lide v. Mears, 231 N.C. 111, 56 S.E.2d 404 (1949); Angell v. City of Raleigh, 267 N.C. 387, 148 S.E.2d 233 (1966).

Actions for a declaratory judgment under the provisions of this section will lie only in a case in which there is an actual or real existing controversy between parties having adverse interests in the matter in dispute. Branch Banking & Trust Co. v. Whitfield, 238 N. C. 69, 76 S. E. (2d) 334 (1953).

Jurisdiction under this and the sections following may be invoked only in a case in which there is an actual or real existing controversy between parties having adverse interests in the matter in dispute. Greensboro v. Wall, 247 N. C. 516, 101 S. E. (2d) 413 (1958).

When a litigant seeks relief under the declaratory judgment statute, he must set forth in his pleading all facts necessary to disclose the existence of an actual controversy between the parties to the action with regard to their respective rights and duties in the premises. Haley v. Pickelsimer, 261 N.C. 293, 134 S.E.2d 697 (1964).

The superior court has jurisdiction to render a declaratory judgment only when the pleadings and evidence disclose the existence of a genuine controversy between the parties to the action, arising out of conflicting contentions as to their respective legal rights and liabilities under a deed, will, contract, statute, ordinance, or franchise. Nationwide Mut. Ins. Co. v. Roberts, 261 N.C. 285, 134 S.E.2d 654 (1964).

When a complaint alleges a bona fide controversy justiciable under the Declaratory Judgment Act, and it does not appear from the complaint that necessary parties are absent from the suit, a demurrer to the complaint should be overruled. Nationwide Mut. Ins. Co. v. Roberts, 261 N.C. 285, 134 S.E.2d 654 (1964).

Where a complaint in a proceeding for a declaratory judgment stated a justiciable controversy, a demurrer should have been overruled, and after the filing of an answer a decree containing a declaration of right should have been entered. Hubbard v. Josey, 267 N.C. 651, 148 S.E.2d 638 (1966); Walker v. City of Charlotte, 268 N.C. 345, 150 S.E.2d 493 (1966).

This article was not intended to require the court to give advisory opinions when no genuine controversy presently exists between the parties. Angell v. City of Raleigh, 267 N.C. 387, 148 S.E.2d 233 (1966).

Facts held insufficient to present controversy under the Declaratory Judgment Act. Nascar, Inc. v. Blevins, 242 N. C. 282, 87 S. E. (2d) 490 (1955).

The test of the sufficiency of a complaint in a declaratory judgment proceeding is not whether the complaint shows that the plaintiff is entitled to the declaration of rights in accordance with his theory, but whether he is entitled to a declaration of rights at all, so that even if the plaintiff is on the wrong side of the controversy, if he states the existence of a controversy which should be settled, he states a cause of suit for a declaratory judgment. Hubbard v. Josey, 267 N.C. 651, 148 S.E.2d 638 (1966); Walker v. City of Charlotte, 268 N.C. 345, 150 S.E.2d 493 (1966).

General Principles Govern Demurrers.— The use and determination of demurrers in declaratory judgment actions are controlled by the same principles that apply in other cases. Woodard v. Carteret County, 270 N.C. 55, 153 S.E.2d 809 (1967).

A demurrer is rarely an appropriate pleading for a defendant to file to a petition for declaratory judgment. Where the plaintiff's pleading sets forth an actual or justiciable controversy, it is not subject to demurrer since it sets forth a cause of action, even though the plaintiff may not be entitled to a favorable declaration on the facts stated in his complaint; that is, in passing on the demurrer, the court is not concerned with the question whether plaintiff is right in a controversy, but only with whether he is entitled to a declaration of rights with respect to the matters alleged. Walker v. City of Charlotte, 268 N.C. 345, 150 S.E.2d 493 (1966); Woodard v. Carteret County, 270 N.C. 55, 153 S.E.2d 809 (1967).

The general rule is that where plaintiff's pleading, in an action for a declaratory judgment, sets forth an actual or justiciable controversy, or a bona fide justiciable controversy, it is not subject to demurrer, since it sets forth a cause of action. This is true even though plaintiff is not entitled to a favorable declaration on the facts stated in his complaint, or to any relief, or is wrong in his contention as to his ultimate rights, since, in passing on the demurrer, the court is not concerned with

whether he is entitled to a declaration of rights with respect to the matters alleged. Walker v. City of Charlotte, 268 N.C. 345, 150 S.E.2d 493 (1966).

When a complaint alleges a bona fide controversy justiciable under the Declaratory Judgment Act, and it does not appear from the complaint that necessary parties are absent from the suit, a demurrer to the complaint should be overruled. The parties are entitled to a declaration of their rights and liabilities and the action should be disposed of only by a judgment declaring them. Woodard v. Carteret County, 270 N.C. 55, 153 S.E.2d 809 (1967).

Only civil rights, status, etc.—

An action is maintainable under the Declaratory Judgment Act only in so far as it affects the civil rights, status and other relations in the present actual controversy between parties. Chadwick v. Salter, 254 N. C. 389, 119 S. E. (2d) 158 (1961).

Immunity of State Not Waived.—The State has not waived its immunity against suit by one of its citizens under the Declaratory Judgment Act to adjudicate his tax liability under the sales tax statute. Housing Authority v. Johnson, 261 N.C. 76, 134 S.E.2d 121 (1964).

Hence, the Commissioner of Revenue cannot be sued pursuant to the provisions of the Declaratory Judgment Act. Housing Authority v. Johnson, 261 N.C. 76, 134 S.E.2d 121 (1964).

In an action under this section to construe an easement granted by the State, judgment may not be entered enjoining the State and its employees from interfering with an easement as defined by the court, since no action, except as provided in § 143-291, may be maintained against the State or any agency thereof in tort or to restrain the commission of a tort. Shingleton v. State, 260 N.C. 451, 133 S.E.2d 183 (1963).

Article Does Not Supersede Rule That State Cannot Be Delayed in Collection of Revenue.—As broad and comprehensive as it is, this article does not supersede the rule that the sovereign may not be denied or delayed in the enforcement of its right to collect the revenue upon which its existence depends. Bragg Development Co. v. Braxton, 239 N. C. 427, 79 S. E. (2d) 918 (1954).

Article Does Not Vest in Superior Court Power to Supervise Officials of Inferior Courts. — While the Declaratory Judgment Act is comprehensive in scope and purpose, the legislature, in enacting it did not intend to vest in the superior courts of the State the general power to oversee, supervise, direct, or instruct officials of inferior courts in the discharge of their official duties. Fuquay Springs v. Rowland, 239 N. C. 299, 79 S. E. (2d) 774 (1954); City of Henderson v. County of Vance, 260 N.C. 529, 133 S.E.2d 201 (1963).

Failure of Clerk of Local Court to Collect and Account for Moneys.—The failure of a clerk of a local court to collect and account for moneys rightfully belonging to a municipality because of alleged error in the taxing of costs in criminal prosecutions in his court may not be made the subject of an action instituted under the Declaratory Judgment Act. Fuquay Springs v. Rowland, 239 N. C. 299, 79 S. E. (2d) 774 (1954).

A moot question is not within the scope of the Declaratory Judgment Act. Morris v. Morris, 245 N. C. 30, 95 S. E. (2d) 110 (1956).

A proceeding under the Declaratory Judgment Act for a declaration as to how the estate of deceased passed by his purported will must be dismissed when the record of probate of the instrument discloses on its face that the paper writing had not been proven as required by statute, since in such instance the question of title to property under the paper writing is moot. Morris v. Morris, 245 N. C. 30, 95 S. E. (2d) 110 (1956).

The validity of a statute, when directly and necessarily involved, may be determined in a properly constituted action under this and sections following; but this may be done only when some specific provision thereof is challenged by a person who is directly and adversely affected thereby. Greensboro v. Wall, 247 N C. 516, 101 S. E. (2d) 413 (1958); Angell v. City of Raleigh, 267 N.C. 387, 148 S.E.2d 233 (1966).

Under the broad terms of the Declaratory Judgment Act there was held to be a right to challenge the Firemen's Pension Fund Act, § 118-18 et seq., in the superior court. It did not appear that the instant case was an action against the State and the allegations were sufficient to show the court had jurisdiction of the cause. American Equitable Assurance Co. v. Gold, 248 N. C. 288, 103 S. E. (2d) 344 (1958).

The Declaratory Judgment Act does not authorize an action to determine the validity of a taxing statute in lieu of, or in substitution for, the specific statutory procedure provided for that purpose. Great American Ins Co. v Gold, 254 N. C. 168, 118 S. E. (2d) 792 (1961).

A declaratory judgment may be entered only after answer and on such evidence as the parties may introduce upon the trial or hearing, in the absence of a stipulation. Nationwide Mut. Ins. Co. v. Roberts, 261 N.C. 285, 134 S.E.2d 654 (1964); Hubbard v. Josey, 267 N.C. 651, 148 S.E.2d 638 (1966).

Question of Insurer's Liability.—

Generally questions involving the liability of insurance companies under their policies ar proper subjects for declaratory relief. Iowa Mut. Ins. Co. v. Fred M. Simmons, Inc., 258 N. C. 69, 128 S. E. (2d) 19 (1962); Nationwide Mut. Ins. Co. v. Roberts, 261 N.C. 285, 134 S.E.2d 654 (1964).

Where a declaratory judgment action served the dual purpose of determining with finality an insurance company's obligation to defend the insured in a tort action pending against the insured and the company's ultimate liability for any judgment rendered against the insured. the case was a perfect one for declaratory judgment. Stout v. Grain Dealers Mut. Ins. Co., 307 F. (2d) 521 (1962).

Action to Determine Right to Easement.—

An action to obtain a judicial declaration of plaintiff's right to an easement appurtenant over the lands of defendants is authorized by the Declaratory Judgment Act. Hubbard v. Josey, 267 N.C. 651, 148 S.E.2d 638 (1966).

A controversy between an individual and the State as to the extent of an easement granted to the individual by the State may be made the basis of a suit against the State in the superior court under this section. since such suit involves title to realty within the purview of § 41-10.1. Shingleton v. State, 260 N.C. 451, 133 S.E.2d 183 (1963); Hubbard v. Josey, 267 N.C. 651, 148 S.E.2d 638 (1966).

Jurisdiction of Industrial Commission Exclusive in Workmen's Compensation Cases.—In an action instituted in the superior court under the Declaratory Judgment Act or otherwise. when the pleadings disclose an employee-employer relationship exists so as to make the parties subject to the provisions of the Workmen's Compensation Act, dismissal is proper for the Industrial Commission has exclusive jurisdiction in such cases. Cox v. Pitt County Transp. Co., Inc., 259 N. C. 38, 129 S. E. (2d) 589 (1963).

Such as One Involving Right of Insurance Carrier to Subrogation.—The Declaratory Judgment Act may not be used to determine whether or not the employer's insurance carrier is entitled to the right of subrogation against the funds received from the third party tort-feasor, under the provisions of § 97-10.2, since the Industrial Commission has the exclusive original jurisdiction to determine the question. Cox v. Pitt County Transp. Co., Inc., 259 N. C. 38 129 S. E. (2d) 589 (1963).

Question as to Right of Adopted Children to Share in Corpus of Trust.—Where, in an action to construe a will, the parties sought adjudication as to whether the three adopted children of testator's nephew would be entitled to share in the corpus of a trust after the death of the life beneficiaries, it was held that since the question was one of law and presently determinable, and since it was not moot unless all three adopted children should die prior to the death of the survivor of the life beneficiaries, the parties were entitled to a determination of the question. Wachovia Bank & Trust Co. v. Green, 238 N. C. 339, 78 S. E. (2d) 174 (1953).

Right to Close Alleyway.—Where an alleyway ending in a cul-de-sac was referred to in the respective deeds to contiguous lots, the right to close a part of the alley at the cul-de-sac end could be determined under the Declaratory Judgment Act. Hine v. Blumenthal, 239 N. C. 537, 80 S. E. (2d) 458 (1954); Hubbard v. Josey, 267 N.C. 651, 148 S.E.2d 638 (1966).

A controversy as to whether deeds created a fee upon special limitation and as to whether title would revert to grantors upon the threatened happening of the contingency, may be maintained under the Declaratory Judgment Act. Charlotte Park & Recreation Comm. v. Barringer, 242 N. C. 311, 88 S. E. (2d) 114 (1955); Hubbard v. Josey, 267 N.C. 651, 148 S.E.2d 638 (1966).

Applied in Blue Ridge Memorial Park, Inc. v. Union Nat. Bank, Inc., 237 N. C. 547, 75 S. E. (2d) 617 (1953); Bradford v. Johnson, 237 N. C. 572, 75 S. E. (2d) 632 (1953); Greensboro v. Smith, 239 N. C. 138, 79 S. E. (2d) 486 (1954); Fuller v. Hedgpeth, 239 N. C. 370, 80 S. E. (2d) 18 (1954); Hubbard v. Wiggins, 240 N. C. 197, 81 S. E. (2d) 630 (1954); Julian v. Lawton, 240 N. C. 436, 82 S. E. (2d) 210 (1954); Mesimore v. Palmer, 245 N. C. 488, 96 S. E. (2d) 356 (1957); Finch v. Honeycutt, 246 N. C. 91, 97 S. E. (2d) 478 (1957); Wachovia Bank & Trust Co. v. Taliaferro, 246 N. C. 121, 97 S. E. (2d) 776 (1957); Walker v. Moss, 246 N. C. 196, 97 S. E. (2d) 836 (1957); Carter v. Davis, 246 N. C. 191, 97 S. E (2d) 838 (1957); Reed v. Elmore, 246 N. C. 221, 98

S. E. (2d) 360 (1957); Competitor Liaison Bureau of Nascar, Inc. v. Midkiff, 246 N. C. 409, 98 S. E. (2d) 468 (1957); Edmondson v. Henderson, 246 N. C. 634, 99 S. E. (2d) 869 (1957); Bullock v. Bullock, 251 N. C. 559, 111 S. E. (2d) 837 (1960); Parker v. Parker, 252 N. C. 399, 113 S. E. (2d) 899 (1960); Lanier v. Dawes, 255 N. C. 458, 121 S. E. (2d) 857 (1961); Eastern Carolina Tastee-Freez, Inc. v. Raleigh 256 N. C. 208, 123 S. E. (2d) 632 (1962); Cline v. Olson, 257 N. C. 110, 125 S. E. (2d) 320 (1962); Poindexter v. Wachovia Bank & Trust Co., 258 N. C. 371, 128 S. E. (2d) 867 (1963); Thomas v. Thomas, 258 N. C. 590, 129 S. E. (2d) 239 (1963); Worsley v. Worsley, 260 N.C. 259, 132 S.E.2d 579 (1963); Tolson v. Young, 260 N.C. 506, 133 S.E.2d 135 (1963); Joyce v. Joyce, 260 N.C. 757, 133 S.E.2d 675 (1963); Clark v. Meyland, 261 N.C. 140, 134 S.E.2d 168 (1964); Adams v. Adams, 261 N.C. 342, 134 S.E.2d 633 (1964); Iowa Mut. Ins. Co. v. Fred M. Simmons, Inc., 262 N.C. 691, 138 S.E.2d 512 (1964); Walker v. City of Charlotte, 262 N.C. 697, 138 S.E.2d 501 (1964); First Union Nat'l Bank v. Broyhill, 263 N.C. 189, 139 S.E.2d 214 (1964); Central Carolina Bank & Trust Co. v. Bass, 265 N.C. 218, 143 S.E.2d 689 (1965); Gardner v. City of Reidsville, 269 N.C. 581, 153 S.E.2d 139 (1967); Grant v. Banks, 270 N.C. 473, 155 S.E.2d 87 (1967); Breece v. Breece, 270 N.C. 605, 155 S.E.2d 65 (1967); Gaskill v. Costlow, 270 N.C. 686, 155 S.E.2d 148 (1967); Ray v. Ray, 270 N.C. 715, 155 S.E.2d 185 (1967); Harrelson v. City of Fayetteville, 271 N.C. 87, 155 S.E.2d 749 (1967); Fullam v. Brock, 271 N.C. 145, 155 S.E.2d 737 (1967).

Quoted in Walters v. Baptist Children's Home of North Carolina, Inc., 251 N. C. 369, 111 S. E. (2d) 707 (1959); Gregory v. Godfrey, 254 N. C. 215, 118 S. E. (2d) 538 (1961).

Cited in Efird v. Efird, 234 N. C. 607, 68 S. E. (2d) 279 (1951); North Carolina State Ports Authority v. First-Citizens Bank & Trust Co., 242 N. C. 416, 88 S. E. (2d) 109 (1955); Taylor v. Taylor, 243 N. C. 726, 92 S. E. (2d) 136 (1956); Blanchard v. Ward, 244 N. C. 142, 92 S. E. (2d) 776 (1956); Price v. Davis, 244 N. C. 229, 93 S. E. (2d) 93 (1956); Farmville v. A. C. Monk & Co., 250 N. C. 171, 108 S. E. (2d) 479 (1959); Dickey v. Herbin, 250 N. C. 321, 108 S. E. (2d) 632 (1959); Brown v. Byrd, 252 N. C. 454, 113 S. E. (2d) 804 (1960); Andrews v. Andrews, 253 N. C. 139, 116 S. E. (2d) 436 (1960); Seaford v. Nationwide Mutual Ins. Co., 253 N. C. 719, 117 S. E. (2d) 733 (1961); Employers' Fire Ins. Co. v. British America Assurance Co., 259 N. C. 485, 131 S. E. (2d) 36 (1963); Tilley v. Tilley, 268 N.C. 630, 151 S.E.2d 592 (1966).

§ 1-254. Courts given power of construction of all instruments.

Contracts.—When jurisdiction exists, a contract may be construed either before or after there has been a breach of it. Nationwide Mut. Ins. Co. v. Roberts, 261 N.C. 285, 134 S.E.2d 654 (1964).

Statutes. — The Uniform Declaratory Judgment Act furnishes a particularly appropriate method for the determination of controversies relative to the construction and validity of a statute, provided there is an actual or justiciable controversy between the parties in respect to their rights under the statute. Woodard v. Carteret County, 270 N.C. 55, 153 S.E.2d 809 (1967).

A petition for a declaratory judgment is particularly appropriate to determine the constitutionality of a statute when the parties' desire and the public need requires a speedy determination of important public interests involved therein. Woodard v. Carteret County, 270 N.C. 55, 153 S.E.2d 809 (1967).

Release of Prospective Testamentary Benefit. Where the heart of a case was the determination of the effect, meaning and validity of a release of a testamentary benefit from a prospective testator and the rights of the parties thereunder, there was a real controversy which plaintiffs were entitled to have determined. Stewart v. McDade, 256 N. C. 630, 124 S. E. (2d) 822 (1962).

Applied in North Carolina State Art Society v. Bridges, 235 N. C. 125, 69 S. E. (2d) 1 (1952); Walters v. Baptist Children's Home of North Carolina, Inc., 251 N. C. 369, 111 S. E. (2d) 707 (1959); Great American Ins. Co. v. Gold, 254 N. C. 168, 118 S. E. (2d) 792 (1961); Gregory v. Godfrey, 254 N. C. 215, 118 S. E. (2d) 538 (1961).

Quoted in Hine v. Blumenthal, 239 N. C. 537, 80 S. E. (2d) 458 (1954); Bennett v. Attorney General, 245 N. C. 312, 96 S. E. (2d) 46 (1957); American Equitable Assurance Co. v. Gold, 248 N. C. 288, 103 S. E. (2d) 344 (1958); Little v. Wachovia Bank & Trust Co., 252 N. C. 229, 113 S. E. (2d) 689 (1960).

Cited in Citizens Nat. Bank v. Phillips, 235 N. C. 494, 70 S. E. (2d) 509 (1952).

§ 1-255. Who may apply for a declaration.

Applied in Cunningham v. Brigman, 263 N.C. 208, 139 S.E.2d 353 (1964).

Quoted in Dickey v. Herbin, 250 N. C. 321, 108 S. E. (2d) 632 (1959); Little v. Wachovia Bank & Trust Co., 252 N. C. 229, 113 S. E. (2d) 689 (1960).

§ 1-256. Enumeration of declarations not exclusive.

Quoted in Hine v. Blumenthal, 239 N. C. 537, 80 S. E. (2d) 458 (1954).

§ 1-257. Discretion of court.

Applied in National Ass'n for Advancement of Colored People v. Eure, 245 N. C. 331, 95 S. E. (2d) 893 (1957).

§ 1-258. Review.

This section does not enlarge the right of an executor for a review, but provides for review under the same rules that apply in cases not brought pursuant to the Declaratory Judgment Act. Dickey v. Herbin, 250 N. C. 321, 108 S. E. (2d) 632 (1959).

§ 1-260. Parties.

Language of section is clear and specific. McMillan v. Robeson County, 262 N.C. 413, 137 S.E.2d 105 (1964).

Absence of Necessary Party.—The latter portion of the first sentence of this section ordinarily should not be relied on by the courts as authority to proceed to judgment without the presence of all necessary parties, when in the course of a trial the absence of such parties becomes apparent. Morganton v. Hutton & Bourbonnais Co., 247 N. C. 666, 101 S. E. (2d) 679 (1958).

Where it appears in a case involving the construction of a will that the absence of a necessary party prevents the entry of a judgment finally settling and determining the question of interpretation, the court should refuse to deal with the merits of the case until the absent person is brought in as a party to the action. Edmondson v. Henderson, 246 N. C. 634, 99 S. E. (2d) 869 (1957).

Parties to Action to Determine Right to Close Alleyway.—The owners of the fee in an alleyway in which owners of contiguous lots had an easement were necessary parties in an action under the Declaratory Judgment Act to determine whether a part of the alleyway at the cul de-sac end might be closed, as against the contention of one lot owner that he had the right to have the entire alleyway kept open. But a lot owner who had leased her entire interest, and a party agreeing to lease the alleyway only in the event a part of it could be closed, were not necessary parties to the proceeding. Hine v. Blumenthal, 239 N. C. 537, 80 S. E. (2d) 458 (1954).

Applied in Marsden v. Southern Flight Service, Inc., 192 F. Supp. 418 (1961); Pitt & Greene Elec. Membership Corp. v. Carolina Power & Light Co., 261 N.C. 716, 136 S.E.2d 124 (1964); North Carolina Turnpike Authority v. Pine Island, Inc., 265 N.C. 109, 143 S.E.2d 319 (1965).

Cited in Dickey v. Herbin, 250 N. C. 321, 108 S. E. (2d) 632 (1959); Chadwick v. Salter, 254 N. C. 389, 119 S. E. (2d) 158 (1961).

§ 1-261. Jury trial.

Applied in Iowa Mut. Ins. Co. v. Fred M. Simmons, Inc., 258 N. C. 69, 128 S. E. (2d) 19 (1962).

Cited in Stout v. Grain Dealers Mut. Ins. Co., 201 F. Supp 647 (1962), affirmed in 307 F. (2d) 521 (1962).

§ 1-262. Hearing before judge where no issues of fact raised or jury trial waived; what judge may hear.

When Court Should Not Consider Evidence and Find Additional Facts.—In an action under the Declaratory Judgment Act when the pleadings do not raise issues of fact, the court is without authority to consider evidence and find additional facts. Thus where the facts were established by defendant's unequivocal admission of all of plaintiffs' factual allegations, the court should not have considered affidavits offered by plaintiffs, and the findings of fact incorporated in the judgment, to the extent that they differed from or went beyond the facts established by the

pleadings, would not be considered on appeal. Greensboro v. Wall, 247 N. C. 516, 101 S. E. (2d) 413 (1958).

Applied in Breece v. Breece, 270 N.C. 605, 155 S.E.2d 65 (1967).

Cited in North Carolina State Ports Authority v. First-Citizens Bank & Trust Co., 242 N. C. 416, 88 S. E. (2d) 109 (1955); Stout v. Grain Dealers Mut. Ins. Co., 201 F. Supp. 647 (1962), affirmed in 307 F. (2d) 521 (1962).

§ 1-263. Costs.

Applied in Board of Managers v. Wilmington, 237 N. C. 179, 74 S. E. (2d) 749 (1953).

§ 1-264. Liberal construction and administration.

Applied in Woodard v. Carteret County, 270 N.C. 55, 153 S.E.2d 809 (1967).

Quoted in American Equitable Assurance Co. v. Gold, 248 N. C. 288, 103 S. E. (2d) 344 (1958).

§ 1-265. Word "person" construed.

Allegations taken as true for purpose of testing demurrer qualified plaintiff insurance companies as "persons" within meaning of this section. American Equitable Assurance Co. v. Gold, 248 N. C. 288, 103 S. E. (2d) 344 (1958).

SUBCHAPTER IX. APPEAL.

Article 27.

Appeal.

§ 1-268. Writs of error abolished.

To obtain relief from an irregular judgment, that is, one entered contrary in some material respect to the course of practice and procedure allowed and permitted by law, and not a mere erroneous interpretation of the law, the injured party should proceed by motion in the original cause. Menzel v. Menzel, 250 N. C. 649, 110 S. E. (2d) 333 (1959).

Or Mistaken Interpretation of Law. — To obtain relief from a mistaken interpretation of the law resulting in an erroneous judgment, the complaining party has his remedy by appeal or proceedings equivalent thereto taken in due time. Menzel v. Menzel, 250 N. C. 649, 110 S. E. (2d) 333 (1959).

§ 1-269. Certiorari, recordari, and supersedeas.

II. CERTIORARI.

B General Consideration.

Substitute for Appeal.—

In accord with 3rd paragraph in original. See In re Burris, 261 N.C. 450, 135 S.E.2d 27 (1964).

Effect of Certiorari.—

When issued, the writ of certiorari suspends the authority of the lower court in a case pending the action of the reviewing court. Wheeler v. Thabit, 261 N.C. 479, 135 S.E.2d 10 (1964).

Applied in Baker v. Varser, 240 N. C. 260, 82 S. E. (2d) 90 (1954).

Cited in Baker v. Varser, 239 N. C. 180, 79 S. E. (2d) 757 (1954); Menzel v. Menzel, 250 N. C. 649, 110 S. E. (2d) 333 (1959); In re McCoy, 233 F. Supp. 409 (E.D.N.C. 1964).

C. Illustrative Cases.

Noncompliance with Rules Governing Appeals. — Where plaintiff, appearing in propria persona because of an asserted inability to employ counsel, fails to comply with the rules of court governing appeals, the Supreme Court, in the exercise of its supervisory jurisdiction, may treat the purported appeal as a petition for certiorari. Huffman v. Douglass Aircraft Co., 260 N.C. 308, 132 S.E.2d 614 (1963)

Removal of Public Officer or Employee. —If the act of removal of a public officer is executive it is not reviewable on certiorari but if it is on hearing and formal findings, it is reviewable. Stated in another way, the writ may be invoked only to review acts which are clearly judicial or quasi-judicial. Bratcher v. Winters, 269 N.C. 636, 153 S.E.2d 375 (1967).

When a governmental agency has power to remove a public officer only for cause after hearing, the ouster proceeding is judicial or quasi-judicial in nature, and may be reviewed by certiorari. Bratcher v. Winters, 269 N.C. 636, 153 S.E.2d 367 (1967).

A hearing, pursuant to the provisions of the act creating the civil service board of a city, with respect to the discharge of a classified employee of the city by the civil service board, was held a quasi-judicial function and reviewable upon a writ of certiorari issued from the superior court. In re Burris, 261 N.C. 450, 135 S.E.2d 27 (1964); Bratcher v. Winters, 269 N.C. 636, 153 S.E.2d 375 (1967).

An order entered by the civil service board of a city, dismissing a policeman from the police department, was properly brought up for the superior court's review by writ of certiorari. Bratcher v. Winters, 269 N.C. 636, 153 S.E.2d 375 (1967).

Demotion of Policeman.—The order entered by a chief of police demoting a policeman from captain of detectives to patrolman was the administrative act of the chief of police and neither judicial nor quasi-judicial in its nature, hence the order was not reviewable by the superior court on certiorari. Bratcher v. Winters, 269 N.C. 636, 153 S.E.2d 375 (1967).

IV. SUPERSEDEAS.

Definition and Scope of Writ.—

In accord with 1st paragraph in original. See New Bern v. Walker, 255 N. C. 355, 121 S. E. (2d) 544 (1961).

§ 1-270. Appeal to Supreme Court; security on appeal; stay.

Cited in State v. City Coach Co., 234 N. C. 489, 67 S. E. (2d) 629 (1951) (con. op.); Richardson v. Cooke, 238 N. C. 449, 78 S. E. (2d) 208 (1953).

§ 1-271. Who may appeal.

Appeals lie from the superior court to the Supreme Court as a matter of right rather than as a matter of grace. Harrell v. Harrell, 253 N. C. 758, 117 S. E. (2d) 728 (1961).

And Only the "Aggrieved" May Appeal.—

In accord with 1st paragraph in original. See Langley v. Gore, 242 N. C. 302, 87 S. E. (2d) 519 (1955); Dickey v. Herbin, 250 N. C. 321, 108 S. E. (2d) 632 (1959); Waldron Buick Co. v. General Motors Corp., 251 N. C. 201, 110 S. E. (2d) 870 (1959); State v. Maybelle Transport Co., 252 N. C. 776, 114 S. E. (2d) 768 (1960); Coburn v. Roanoke Land & Timber Corp., 260 N.C. 173, 132 S.E.2d 340 (1963).

Where a party is not aggrieved by the judicial order entered, his appeal will be dismissed. Gaskins v. Blount Fertilizer Co., 260 N.C. 191, 132 S.E.2d 345 (1963).

Where both plaintiffs and defendants appeal from judgment in favor of defendants, defendants' appeal will not be considered when no error is found on plaintiffs' appeal since in such instance defendants are not the parties aggrieved by the judgment. Teague v. Duke Power Co., 258 N. C. 759, 129 S. E. (2d) 507 (1963).

Where order was issued that funds in the custody of the court be turned over to plaintiffs, defendants appealed therefrom on the ground that plaintiffs were not entitled to the funds; but defendants had no interest in or claim to the funds. It was held that defendants were not the parties aggrieved within the meaning of this section. Langley v. Gore, 242 N. C. 302, 87 S. E. (2d) 519 (1955).

"Party Aggrieved" Defined.—

The party aggrieved, within the meaning of this section, is the one whose rights have been directly and injuriously affected by the judgment entered in the superior court. State v. City Coach Co., 234 N. C. 489, 67 S. E. (2d) 629 (1951) (con. op.); Waldron Buick Co. v. General Motors Corp., 251 N. C. 201, 110 S. E. (2d) 870 (1959).

For a party to be aggrieved, he must have rights which were substantially affected by a judicial order. Gaskins v. Blount Fertilizer Co., 260 N.C. 191, 132 S.E.2d 345 (1963).

A party is aggrieved if his rights are substantially affected by judicial order. Coburn v. Roanoke Land & Timber Corp., 260 N.C. 173, 132 S.E.2d 340 (1963); Childers v. Seay, 270 N.C. 721, 155 S.E.2d 259 (1967).

If the judicial order complained of does not adversely affect the substantial rights of appellant, the appeal will be dismissed. Coburn v. Roanoke Land & Timber Corp., 260 N.C. 173, 132 S.E.2d 340 (1963); Childers v. Seay, 270 N.C. 721, 155 S.E.2d 259 (1967).

For various definitions of the words "party aggrieved," see In re Application for Reassignment, 247 N. C. 413, 101 S. E. (2d) 359 (1958).

Refusal to Set Aside Verdict.—Where the trial court enters judgment that

plaintiff recover nothing of certain defendants, such defendants may not, upon plaintiff's appeal from the refusal of the court to enter judgment on the verdict, appeal from the court's refusal to set aside the verdict for errors committed during the trial, since, until a judgment is entered against them, they are not parties aggrieved. Bethea v. Town of Kenly, 261 N.C. 730, 136 S.E.2d 38 (1964).

Interlocutory Order Affecting No Substantial Right.—An appeal from an order requiring the resident father to have the child in court in order that the question of custody might be considered and determined in a habeas corpus proceeding between the parents of the child, separated, but not divorced, is premature and will be dismissed, since the order is interlocutory and affects no substantial right. In re Fitzgerald, 242 N. C. 732, 89 S. E. (2d) 462 (1955).

Instruction on Negligence of Codefendant.—In an action against each of two defendants as joint tort-feasors, one defendant cannot be the party aggrieved by error in the court's instruction to the jury as to the negligence of the other defendant, where they were not adversaries inter se. Childers v. Seay, 270 N.C. 721, 155 S.E.2d 259 (1967).

Trustor under Senior Deed of Trust.—Where a trustor's equity has been divested by foreclosure of a junior deed of trust on the property, he has no rights in the property, and is not a party aggrieved by an order dissolving an injunction against foreclosure of the senior deed of trust. Gaskins v. Blount Fertilizer Co., 260 N.C. 191, 132 S.E.2d 345 (1963).

Parties Enjoined from Cutting Timber.—Where plaintiffs were estopped to assert title to land in controversy, an order enjoining them from cutting timber which they did not own did not affect any substantial right of theirs; hence, plaintiffs were not parties aggrieved. Coburn v. Roanoke Land & Timber Corp., 260 N.C. 173, 132 S.E.2d 340 (1963).

Corporation.—Where an action is entitled named individuals "t/a" a named corporation, the corporation cannot be the party aggrieved by an order striking the names of the individuals and the letters "t/a" from the captions of the summons and complaint and the references to said individuals from the complaint. Williams v Denning, 260 N.C. 540, 133 S.E.2d 148 (1963).

The holder of the legal title as security for a debt has no right to demand possession or foreclose the instrument until requested to do so by a party secured, and therefore the trustee, in the absence of a showing of such request, is not the party aggrieved by, and may not appeal from, a judgment declaring that under § 45-37(5) the right to possession and the right to foreclose were barred. Gregg v. Williamson, 246 N. C. 356, 98 S. E. (2d) 481 (1957).

Applied in Queen City Coach Co. v. Carolina Coach Co., 237 N. C. 697, 76 S. E. (2d) 47 (1953); State v. Equity General Ins. Co., 255 N. C. 145, 120 S. E. (2d) 452 (1961); Lucas v. Felder, 261 N.C. 169, 134 S.E.2d 154 (1964); Marlin v. Moss, 261 N.C. 737, 136 S.E.2d 90 (1964).

Cited in State v City Coach Co., 234 N. C. 489, 67 S.E. (2d) 629 (1951); Bell v. Smith, 263 N.C. 814, 140 S.E.2d 542 (1965).

§ 1-272. Appeal from clerk to judge.

Construed in Pari Materia with § 1-276.—As this section and § 1-276 deal with the same subject matter, they must be construed in pari materia and harmonized to give effect to each. Becker County Sand & Gravel Co. v. Taylor, 269 N.C. 617, 153 S.E.2d 19 (1967).

Appeal Necessary for Jurisdiction of Court.—The superior court does not acquire jurisdiction of a special proceeding before the clerk when there is no appeal from the order of the clerk by a party aggrieved. Becker County Sand & Gravel Co. v. Taylor, 269 N.C. 617, 153 S.E.2d 19 (1967).

Applied in Harris v. Harris, 257 N. C. 416 126 S. E. (2d) 83 (1962).

Stated in North Carolina State Highway & Public Works Comm. v. Mullican, 243 N. C. 68, 89 S. E. (2d) 738 (1955).

Cited in In re Hardin, 248 N. C. 66, 102 S. E. (2d) 420 (1958).

§ 1-273. Clerk to transfer issues of fact to civil issue docket.

Special Proceedings.—

If issues of fact are raised in special proceedings before the clerk, the cause is transferred to the civil issue docket, to be tried as in an ordinary civil action. In the Matter of Wallace, 267 N.C. 204, 147 S.E.2d 922 (1966).

Probate Proceedings.—A clerk of the superior court may probate a will in solemn form, without the verdict of a jury,

that is per testes, where interested parties are cited to appear and "see proceedings," or they come in voluntarily to "see proceedings," and such parties raise no issue of fact. But, where an interested party intervenes in such proceeding and objects to the probate of the will, denying its validity, whether he files a formal caveat or not, it will raise the issue of devisavit vel non, which issue must be tried by a jury. Such procedure is required by this section. In re Ellis' Will, 235 N. C. 27, 69 S. E. (2d) 25 (1952).

Cited in Boone v. Sparrow, 235 N. C. 396, 70 S. E. (2d) 204 (1952); In re Will of Wood, 240 N. C. 134, 81 S. E. (2d) 127 (1954).

§ 1-276. Judge determines entire controversy; may recommit.

Construed in Pari Materia with § 1-272.—As this section and § 1-272 deal with the same subject matter they must be construed in pari materia and harmonized to give effect to each. Becker County Sand & Gravel Co. v. Taylor, 269 N.C. 617, 153 S.E.2d 19 (1967).

Jurisdiction.—Whenever a special proceeding begun before the clerk is, for any ground whatever sent to the superior court before the judge the judge has jurisdiction. Hudson v. Fox, 257 N. C. 789, 127 S. E. (2d) 556 (1962).

Even when the proceeding originally had before the clerk is void for want of jurisdiction, the superior court may yet proceed in the matter. Hudson v. Fox, 257 N. C. 789, 127 S. E. (2d) 556 (1962).

The superior court does not acquire jurisdiction of a special proceeding before the clerk when there is no appeal from the order of the clerk by a party aggrieved. Becker County Sand & Gravel Co. v. Taylor, 269 N.C. 617, 153 S.E.2d 19 (1967).

Judge May Determine Entire Controversy.—

In accord with 1st paragraph in original. See Sale v. State Highway & Public Works Comm., 242 N. C. 612, 89 S. E. (2d) 290 (1955).

In accord with 2nd paragraph in original. See Potts v. Howser, 267 N.C. 484, 148 S.E.2d 836 (1966).

When a civil action or special proceeding instituted before the clerk is "for any ground whatever sent to the superior court before the judge," he has the authority to consider and determine the matter as if originally before him. Langley v. Langley, 236 N. C. 184, 72 S. E. (2d) 235 (1952).

Under the statutes governing probate matters, the superior court, as a mere court of law and equity, has no jurisdiction to determine an issue whether a disputed writing is the last will of a deceased person in an ordinary civil action. However, when an issue of devisavit vel non is raised, that necessitates the transfer of the cause to the civil issue docket for trial by jury, where the superior court in term has jurisdiction to determine the whole matter in controversy as well as the issue of devisavit vel non. Morris v. Morris, 245 N. C. 30, 95 S. E. (2d) 110 (1956).

In the appointment and removal of guardians the appellate jurisdiction of the superior court is derivative, and appeals present for review only errors of law committed by the clerk. In re Simmons, 266 N.C. 702, 147 S.E.2d 231 (1966).

Appeals under this section are confined to civil actions and special proceedings. The decisions are plenary that the removal of a guardian is neither. In re Simmons, 266 N.C. 702, 147 S.E.2d 231 (1966).

The clerk has authority and jurisdiction, initially, to pass upon exceptions to the report of the commissioners in a special proceeding for partition. Allen v. Allen, 258 N. C. 305, 128 S. E. (2d) 385 (1962).

Applied in Clapp v. Clapp, 241 N. C. 281, 85 S. E. (2d) 153 (1954).

Quoted in Rich v. Norfolk Southern Ry. Co., 244 N. C. 175, 92 S. E. (2d) 768 (1956).

Cited in Woody v. Barnett, 235 N. C. 73, 68 S. E. (2d) 810 (1952); In re Will of Wood, 240 N. C. 134, 81 S. E. (2d) 127 (1954); McDaniel v. Fordham, 264 N.C. 62, 140 S.E.2d 736 (1965).

§ 1-277. Appeal from superior court judge.

II. APPEAL IN GENERAL.

A. General Consideration.

The proper method for obtaining relief from legal errors is by appeal under this section and not by application to another superior court. In such cases, a judgment entered by one judge of the superior court may not be modified, reversed or set aside by another superior court judge. Nowell v. Neal, 249 N. C. 516, 107 S. E. (2d) 107 (1959).

An immediate appeal is the proper method to obtain relief from legal errors and it may not be obtained by application to another superior court judge. A judgment entered by one superior court may

not be modified, reversed, or set aside by another. North Carolina State Highway Comm'n v. Nuckles, 271 N.C. 1, 155 S.E.2d 772 (1967).

And appeals lie from the superior court to the Supreme Court as a matter of right rather than as a matter of grace. Harrell v. Harrell, 253 N. C. 758, 117 S. E. (2d) 728 (1961).

But Petitioner Alleging Denial Must Show Appeal Would Have Been Fruitful.—The weight of authority clearly stands for the proposition that the petitioner who claims he was denied his right to appeal through the neglect of counsel must show that his appeal would have been fruitful. Pitts v. North Carolina, 267 F. Supp. 870 (M.D.N.C. 1967).

This section regulates the practice of appeal in respect to when an order or judgment is subject to immediate review. State v. Childs, 265 N.C. 575, 144 S.E.2d 653 (1965).

It Must Be Complied with.—Since there is no right to appeal outside the provisions of the statute, the requirements of the statute must be complied with for the appeal to be made. Pitts v. North Carolina, 267 F. Supp. 870 (M.D.N.C. 1967).

Causes coming before a judge are in the bosom of the court during term time. So long as his orders, judgments and rulings do not fall within the classifications set out in this section, no appeal therefrom will lie. Hollingsworth GMC Trucks, Inc v. Smith, 249 N. C. 764, 107 S. E. (2d) 746 (1959).

Discretionary Power to Consider Premature and Fragmentary Appeal.—Even though an appeal is fragmentary and premature, the Supreme Court may exercise its discretionary power to express an opinion upon the question which the appellant has attempted to raise. Cowart v. Honeycutt, 257 N. C. 136 125 S. E. (2d) 382 (1962); Barrier v. Randolph, 260 N.C. 741, 133 S.E.2d 655 (1963).

Applied in Goldston v. Wright, 257 N. C. 279, 125 S. E. (2d) 462 (1962); Pearsall v Duke Power Co., 258 N. C. 639, 129 S. E. (2d) 217 (1963); Rouse v. Snead, 269 N.C. 623, 153 S.E.2d 1 (1967).

Quoted in Waldron Buick Co. v. General Motors Corp., 251 N. C. 201, 110 S. E. (2d) 870 (1959); State v. Equity General Ins. Co., 255 N. C. 145, 120 S. E. (2d) 452 (1961).

Stated in Raleigh v. Edwards, 234 N. C 528, 67 S. E. (2d) 669 (1951).

Cited in Bell v. Smith, 263 N.C. 814, 140 S.E.2d 542 (1965); State Highway Comm'n v. Raleigh Farmers Market, Inc., 264 N.C. 139, 141 S.E.2d 10 (1965).

B. From What Decisions, Orders, etc., Appeal Lies.

Not every order or judgment of the superior court is immediately appealable to the Supreme Court. State v. Childs, 265 N.C. 575, 144 S.E.2d 653 (1965).

Cause Directly Affected.—

If the judicial order complained of does not adversely affect the substantial rights of appellant, the appeal will be dismissed. Coburn v. Roanoke Land & Timber Corp., 260 N.C. 173, 132 S.E.2d 340 (1963); Childers v. Seay, 270 N.C. 721, 155 S.E.2d 259 (1967).

Where a party is not aggrieved by the judicial order entered, his appeal will be dismissed. Gaskins v. Blount Fertilizer Co., 260 N.C. 191, 132 S.E.2d 345 (1963).

Final Judgment.—

In accord with 2nd paragraph in original. See State v. Childs, 265, N.C. 575, 144 S.E.2d 653 (1965).

An appeal will lie only from a final judgment. Steele v. Moore-Flesher Hauling Co., 260 N.C. 486, 133 S.E.2d 197 (1963).

A decision which disposes not of the whole but merely of a separate and distinct branch of the subject matter in litigation is final in nature and is immediately appealable. North Carolina State Highway Comm'n v. Nuckles, 271 N.C. 1, 155 S.E.2d 772 (1967).

As a general rule orders and judgments which are not final in their nature, but leave something more to be done with the case, are not immediately reviewable. The remedy is to note an exception at the time, to be considered on appeal from final judgment. Cox v. Cox, 246 N. C. 528, 98 S. E. (2d) 879 (1957).

Interlocutory Orders.—

In accord with 2nd paragraph in original. See State v. Childs, 265 N.C. 575, 144 S.E.2d 653 (1965).

In accord with 8th paragraph in original. See Gardner v. Price, 239 N. C. 651, 80 S. E. (2d) 478 (1954); Steele v. Moore-Flesher Hauling Co., 260 N.C. 486, 133 S.E. (2d) 197 (1963).

An appeal will lie from an interlocutory order that affects a substantial right and will work injury if not corrected before final judgment. Steele v. Moore-Flesher Hauling Co., 260 N.C. 486, 133 S.E.2d 197 (1963).

Ordinarily, an appeal lies only from a final judgment, but an interlocutory order which will work injury if not corrected before final judgment is appealable. North Carolina State Highway Comm'n v. Nuckles, 271 N.C. 1, 155 S.E.2d 772 (1967).

Where the question sought to be presented involves property rights and relates to a matter of public importance, and a decision will aid State agencies in the performance of their duties, the Supreme Court may determine the appeal on the merits even though the appeal is from an interlocutory order and premature. Moses v. State Highway Comm'n, 261 N.C. 316, 134 S.E.2d 664 (1964).

An appeal does not lie to the Supreme Court from an interlocutory order of the superior court, unless such order deprives the appellant of a substantial right which he might lose if the order is not reviewed before final judgment. Shelby v. Lackey, 235 N. C. 343, 69 S. E. (2d) 607 (1952); Childers v. Powell, 243 N. C. 711, 92 S. E. (2d) 65 (1956); Tucker v. State Highway & Public Works Comm'n, 247 N. C. 171, 100 S. E. (2d) 514 (1957).

Appellate procedure is designed to eliminate the unnecessary delay and expense of repeated fragmentary appeals, and to present the whole case for determination in a single appeal from the final judgment. To this end, the statute defining the right of appeal prescribes in substance, that an appeal does not lie to the Supreme Court from an interlocutory order of the superior court, unless such interlocutory order deprives the appellant of a substantial right which he might lose if the order is not reviewed before final judgment. Harrell v. Harrell, 253 N. C. 758, 117 S. E. (2d) 728 (1961).

An interlocutory order of a superior court judge, affirming an order of the clerk entered in accordance with § 1-568.11, does not deprive appellant of a substantial right and no appeal lies therefrom. Black v. Williamson, 257 N. C. 763, 127 S. E. (2d) 519 (1962).

Refusal to Dismiss Action.—

A refusal of a motion to dismiss is not a final determination within the meaning of the statute and is not subject to appeal. Cox v. Cox, 246 N. C. 528, 98 S. E. (2d) 879 (1957).

Adjudication that a release for personal injury signed by plaintiff was obtained by fraud does not prejudice defendant in trying the cause on its merits on the issue of negligence, and therefore an appeal taken prior to the trial on the merits from the adjudication that the release was void, is premature and must be dismissed. Cowart v. Honeycutt, 257 N. C. 136, 125 S. E. (2d) 382 (1962).

Denial of Motion for Judgment on the Pleadings.—An appeal does not lie from a denial of a motion for judgment on the pleadings. Barrier v. Randolph, 260 N.C. 741, 133 S.E.2d 655 (1963).

Verdict Set Aside.—When a trial judge, in the exercise of his discretion, sets aside a verdict, his action may not be reviewed in the absence of any suggestion of an abuse of discretion. Atkins v. Doub, 260 N.C. 678, 133 S.E.2d 456 (1963).

Where the verdict is set aside in the court's discretion, there is no judgment from which an appeal may be taken, and on appeal from the action of the court setting the judgment aside, appellant cannot present his contentions of error in denying his motion for judgment as of nonsuit. Atkins v. Doub, 260 N.C. 678, 133 S.E.2d 456 (1963).

C. What Supreme Court Will Consider.

When Appeal Is Premature.—

In accord with 2nd paragraph in original. See Ingle v. McCurry, 243 N. C. 65, 89 S. E. (2d) 745 (1955).

Upon the hearing of exceptions to the referee's report, the court's order vacating the report and ordering a new survey is purely interlocutory and affects no substantial right, and an appeal therefrom is fragmentary and premature. Cox v. Shaw, 243 N. C. 191, 90 S. E. (2d) 327 (1955).

III. APPEAL AS TO PARTICULAR SUBJECTS.

B. Demurrer.

An order or judgment which sustains a demurrer affects a substantial right and a defendant may appeal therefrom. Rule 4(a), Rules of Practice in the Supreme Court, when otherwise applicable, limits the right of immediate appeal only in instances where the demurrer is overruled. Quick v. High Point Memorial Hosp., Inc., 269 N.C. 450, 152 S.E.2d 527 (1967).

Order Sustaining Demurrer to Plea in Bar. — An order or judgment which sustains a demurrer to a plea in bar affects a substantial right and a defendant may appeal therefrom. Mercer v. Hilliard, 249 N. C. 725, 107 S. E. (2d) 554 (1959); Hardin v. American Mut. Fire Ins. Co., 261 N.C. 67, 134 S.E.2d 142 (1964); Kleibor v. Rogers, 265 N.C. 304, 144 S.E.2d 27 (1965).

An appeal from a judgment sustaining a plea in bar is not regarded as premature. Cowart v. Honeycutt, 257 N. C. 136, 125 S. E. (2d) 382 (1962).

Order Striking Portion of Pleading. — When an order striking a portion of a pleading is in effect an order sustaining a demurrer and denying the pleader a

right to recover for failure to state facts sufficient to constitute a cause of action, it is within the provisions of this section and appealable. Etheridge v. Carolina Power & Light Co., 249 N. C. 367, 106 S E. (2d) 560 (1959).

Where plaintiff alleged a cause of action for wrongful death and a cause of action to recover damages for pain and suffering endured by his intestate from the time of injury to the date of death, the allowance of a motion to strike all the allegations stating the cause of action for pain and suffering amounted to a demurrer dismissing that cause of action, and the order was immediately appealable. Sharpe v. Pugh, 270 N.C. 598, 155 S.E.2d 108 (1967).

Order Allowing Motion to Strike Allegations in Answer.—In a proceeding by a housing authority to condemn land, a motion of the housing authority to strike in their entirety allegations in the answer setting up a plea in bar that the housing authority acted capriciously and arbitrarily in selecting the land for the site of the housing project, was in effect a demurrer to the plea in bar and an order allowing the motion is appealable. Housing Authority of City of Wilson v. Wooten, 257 N. C. 358, 126 S. E. (2d) 101 (1962).

Order Allowing Plaintiff to Withdraw Appeal from Final Judgment and File Amended Complaint. — Where, upon demurrer, a cause of action is dismissed, and at a subsequent term plaintiff is allowed to withdraw her appeal from the final judgment and file an amended complaint, such order affects a substantial right of the defendant and he is entitled to appeal therefrom. Mills v. Richardson, 240 N. C. 187, 81 S. E. (2d) 409 (1954).

D. Injunction.

Injunction against Cutting Timber.— Where plaintiffs were estopped to assert title to land in controversy, an order enjoining them from cutting timber which they did not own did not affect any substantial right of theirs; hence, plaintiffs were not parties aggrieved. Coburn v. Roanoke Land & Timber Corp., 260 N.C. 173, 132 S.E.2d 340 (1963).

E. Nonsuit.

In General.—

Where the clerk permits voluntary nonsuit in an action in which defendant has asserted his right to affirmative relief, order of the superior court reversing the clerk's judgment of nonsuit has the same effect as if plaintiff's motion for dismissal as of voluntary nonsuit had been made in the first instance before the judge, and attempted appeal from the order reversing the nonsuit is a nullity notwithstanding that the judge signs the appeal entries. Cox v. Cox, 246 N. C. 528, 98 S. E. (2d) 879 (1957).

Setting Aside Nonsuit.—Where the superior court granted nonsuit on defendant's counterclaim, but after the jury's failure to reach a verdict on plaintiff's action, withdrew a juror, ordered a mistrial, and set aside the nonsuit on the counterclaim, although the striking out of the nonsuit involved a question of law, the court had the right to change his ruling on the motion any time before verdict, and therefore the exercise of such right could not affect a substantial right of plaintiff, and the action of the court is not appealable. Hollingsworth GMC Trucks, Inc. v. Smith, 249 N. C. 764, 107 S. E. (2d) 746 (1959).

F. Order of Reference and Referee's Report.

Relating to Reference of Cause.—

Ordinarily an appeal will not lie from an order of compulsory reference made pursuant to statute, and where there is no complete plea in bar to the entire case. Harrell v. Harrell, 253 N. C. 758, 117 S. E. (2d) 728 (1961).

Vacating Report and Ordering New Survey. — Upon the hearing of exceptions to the referee's report, the court's order vacating the report and ordering a new survey is purely interlocutory and affects no substantial right, and an appeal therefrom is fragmentary and premature. Cox v Shaw, 243 N. C. 191, 90 S. E. (2d) 327 (1955).

G. Appeals as to Miscellaneous Subjects.

Order Providing for Joinder of Additional Parties.—While ordinarily an order providing for the joinder of additional parties is not appealable, in an action by an injured employee against a third person tort-feasor, in accordance with the provisions of G. S. 97-10, an order joining the employer and insurance carrier affects the substantial right of the employee to prosecute the action to a final determination without the presence of wholly unnecessary parties, and therefore is appealable. Lovette v. Lloyd, 236 N. C. 663, 73 S. E. (2d) 886 (1953).

Order Permitting Intervention.—Where there is no subsisting controversy as between plaintiff and defendants, an order permitting intervention by parties who may litigate their claim against plaintiff by independent action will be reversed.

Childers v. Powell, 243 N. C. 711, 92 S. E. (2d) 65 (1956).

An order of the superior court remanding the cause to the Industrial Commission is an interlocutory order, and an appeal therefrom to the Supreme Court is premature and is subject to dismissal. However, the Supreme Court in the exercise of its supervisory jurisdiction may, in proper instances, determine the matter in order to obviate a wholly unnecessary and circuitous course of procedure. Edwards v. Raleigh, 240 N. C. 137, 81 S. E. (2d) 273 (1954).

An order entered in a proceeding to abate a public nuisance directing the reopening of defendant's safe and the making of an inventory of the contents, without any showing that the contents of the safe were relevant to that proceeding, is an order affecting a substantial right of defendant, from which appeal lies under this section. State v. Flowers, 247 N. C. 558, 101 S. E. (2d) 320 (1958).

A judgment in a processioning proceeding adopting the referee's findings and conclusions was a final judgment and as such was only reviewable by appeal to this court. Harrill v. Taylor, 247 N. C. 748, 102 S. E. (2d) 223 (1958).

Boundary Dispute.—An order requiring petitioners in a proceeding to establish a disputed boundary to elect between the boundary described in their petition and their claim of title to another line by adverse possession under their amendment to their petition, affects a substantial right and is appealable. Jenkins v. Trantham, 244 N. C. 422, 94 S. E. (2d) 311 (1956).

Condemnation by State Highway Commission.—When the State Highway Commission condemns property under ch. 136, art. 9, appeals by either party are governed by this section, the same as any other civil action. North Carolina State Highway Comm'n v. Nuckles, 271 N.C. 1, 155 S.E.2d 772 (1967).

§ 1-278. Interlocutory orders reviewed on appeal from judgment.

Applied in Goldston v. Wright, 257 N. C. 279, 125 S. E. (2d) 462 (1962).

Cited in Raleigh v. Edwards, 234 N. C. 528, 67 S. E. (2d) 669 (1951).

§ 1-279. When appeal taken.

Constitutionality.—Section 15-180, by incorporating the provisions of this section, provides that notice of appeal must be filed within ten days after rendition of judgment. The constitutionality of this requirement was upheld by the Supreme Court of the United States in Brown v. Allen, 344 U.S. 443, 73 Sup. Ct. 397, 97 L. Ed. 469 (1953). Fox v. North Carolina, 266 F. Supp. 19 (E.D.N.C. 1967).

The provisions of this section and § 1-280 are jurisdictional, and unless they are complied with the Supreme Court acquires no jurisdiction of an appeal and must dismiss it. Aycock v. Richardson, 247 N. C. 233, 100 S. E. (2d) 379 (1957); Jim Walter Corp. v. Gilliam, 260 N.C. 211, 132 S.E.2d 313 (1963); Teague v. Teague, 266 N.C. 320, 146 S.E.2d 87 (1966).

When the requirements of this section and § 1-280 are not complied with, the Supreme Court obtains no jurisdiction of a purported appeal and must dismiss it. Oliver v. Williams, 266 N.C. 601, 146 S.E.2d 648 (1966).

Appeals lie from the superior court to the Supreme Court as a matter of right rather than as a matter of grace. Harrell v. Harrell, 253 N. C. 758, 117 S. E. (2d) 728 (1961).

Defendant Held Not to Have Knowingly and Intelligently Waived His Right of Appeal. — See Fox v. North Carolina, 266 F. Supp. 19 (E.D.N.C. 1967).

Applied in Van Mitchell v. North Carolina, 247 F. Supp. 139 (E.D.N.C. 1964).

Cited in State v. Ferebee, 266 N.C. 606, 146 S.E.2d 666 (1966).

§ 1-280. Entry and notice of appeal.

The Provisions of This Section and § 1-279 Are Jurisdictional. — See note to § 1-279.

Appeals lie from the superior court to the Supreme Court as a matter of right rather than as a matter of grace. Harrell v. Harrell, 253 N. C. 758, 117 S. E. (2d) 728 (1961).

Cited in State v. Ferebee, 266 N.C. 606, 146 S.E.2d 666 (1966).

§ 1-281. Appeals from judgments not in term time.

Clerk Not Authorized to Enlarge Time for Service of Case on Appeal.—This section does not authorize a clerk of the superior court to enlarge the time for service of a statement of the case on appeal in those instances in which appeal is taken from judgment rendered by the court out of term and out of the district by agreement. Little v. Sheets, 239 N. C. 430, 80 S. E. (2d) 44 (1954).

§ 1-282. Case on appeal; statement, service, and return.

II. GENERAL CONSIDERATION —COUNTERCASE.

Procedure Generally.—In those instances requiring a case on appeal, the appellant must serve statement of case on appeal on appellee or its attorney under this section; if the parties do not agree, the case must be settled by the court under § 1-283; if the appeal is on the record proper, it must be certified to the Supreme Court by the clerk of the superior court under § 1-284. Jim Walter Corp. v. Gilliam, 260 N.C. 211, 132 S.E.2d 313 (1963).

Strict Observance, etc.—

The provisions of this section are mandatory. Twiford v. Harrison, 260 N.C. 217, 132 S.E.2d 321 (1963).

Effect of Failure to Serve Countercase.—

The authority of the trial judge to settle a case on appeal may be invoked only by the service of a countercase or by filing exceptions to the appellant's statement of case; otherwise the appellant's statement becomes the case on appeal. American Floor Mach. Co. v. Dixon, 260 N.C. 732, 133 S.E.2d 659 (1963).

Where the solicitor does not serve any countercase or exceptions to defendant's statement of case on appeal, defendant's statement becomes the case on appeal. State v. Rhinehart, 267 N.C. 470, 148 S.E.2d 651 (1966).

Supreme Court order granting time in which to serve statement of case on appeal and time in which to serve exceptions or countercase, and providing that if the case should not be settled by agreement it should be settled by the trial judge within a given time, does not relieve appellant of the duty of requesting the judge to settle the case and of otherwise performing the duties imposed by this section and § 1-283. Wiggins v. Tripp, 253 N. C. 171, 116 S. E. (2d) 355 (1960).

Applied in State v. Stubbs, 265 N.C. 420, 144 S.E.2d 262 (1965); Nicholson v. Dean, 267 N.C. 375, 148 S.E.2d 247 (1966).

Cited in Richardson v Cooke, 238 N. C. 449, 78 S. E. (2d) 208 (1953); Conrad v. Conrad, 252 N. C. 412, 113 S. E. (2d) 912 (1960); Wagner v. Eudy, 257 N. C. 199, 125 S. E. (2d) 598 (1962).

III. REQUISITES OF CASE ON APPEAL—EXCEPTIONS.

Assignments of error may not be filed initially in the Supreme Court, but must be filed in the trial court and certified with the case on appeal. State v. Dew, 240 N. C. 595, 83 S. E. (2d) 482 (1954); E. L. Lowie & Co. v. Atkins, 245 N. C. 98, 95 S. E. (2d) 271 (1956).

Appeal Itself Treated as Exception to Judgment.—Where the exceptions are not grouped, the assignments of error will not be considered, but the appeal itself will be treated as an exception to the judgment. Ellis v. Atlantic Coast Line R. Co., 241 N. C. 747, 86 S. E. (2d) 406 (1955).

V. SERVICE OF CASE AND COUNTERCASE.

A. Necessity and Mode of Service.

Rules requiring service to be made of case on appeal are mandatory. They are applied alike to all appellants. State v. Daniels, 231 N. C. 17, 341, 56 S. E. (2d) 2, 646 (1949), 231 N. C. 509, 57 S. E. (2d) 653 (1950), cert. den. 339 U. S. 954, 70 S. Ct. 837, 94 L. Ed. 1366 (1950); Brown v. Allen, 344 U. S. 443, 73 S. Ct. 397, 437 (1953).

Effect of Failure to Serve Countercase or Exceptions.—

In accord with 1st paragraph in original. See State v. Clayton, 251 N. C. 261, 111 S. E. (2d) 299 (1959).

B. Time of Service.

1. In General.

Strict Compliance Required.—

Rules requiring service to be made of case on appeal within the allotted time are mandatory, not directive. American Floor Mach. Co. v. Dixon, 260 N.C. 732, 133 S.E.2d 659 (1963).

Where appellant's statement of case on appeal was not served within the time allowed by agreement of counsel, the judge was without authority to settle the case, and his attempted settlement of the case, without finding that service within the stipulated time had been waived, did not cure the defect. American Floor Mach. Co. v. Dixon, 260 N.C. 732, 133 S.E.2d 659 (1963).

Only Judge May Enlarge Time for Service.—The General Assembly having expressly fixed the time for serving a statement of case on appeal, and having specifically authorized the judge, in his discretion, to enlarge the time, it would seem, therefore, that this procedure is exclusive. And it will not be assumed that the General Assembly intended by § 1-281 to give to a clerk of the superior court implied authority to do that for which express authority is given to the judge in

this section. Little v. Sheets, 239 N. C. 430, 80 S. E. (2d) 44 (1954).

3. Effect of Failure to Serve in Time.

Record Proper May Be Reviewed for Error Appearing on Its Face.—Where the statement of a case on appeal is not filed within the time allowed, it is a nullity, but failure of the case on appeal does not require dismissal, since the record proper may be reviewed for error appearing on its face and the judgment affirmed on motion of appellant when no error so appears. Little v. Sheets, 239 N. C. 430, 80 S. E. (2d) 44 (1954).

VI. RELIEF GRANTED.

When No Case on Appeal.—

In the absence of a case on appeal served within the time fixed by the statute, or by valid enlargement, the appellate court will review only the record proper and determine whether errors of law are disclosed on the face thereof. American Floor Mach. Co. v. Dixon, 260 N.C. 732, 133 S.E.2d 659 (1963).

§ 1-283 Settlement of case on appeal.

Procedure Generally.—See same catchline in note to § 1-282, analysis line II.

The provisions of this section are mandatory. Twiford v. Harrison, 260 N.C. 217, 132 S.E.2d 321 (1963).

Effect of Failure to Serve Countercase or Exceptions.—The authority of the trial judge to settle a case on appeal may be invoked only by the service of a countercase or by filing exceptions to the appellant's statement of case; otherwise the appellant's statement becomes the case on appeal. American Floor Mach. Co. v. Dixon, 260 N. C. 732, 133 S.E.2d 659 (1963).

He Cannot Settle Case by Anticipatory Order.—

In accord with 1st paragraph in original. See Hall v. Hall, 235 N. C. 711, 71 S. E. (2d) 471 (1952).

Judge May Act Only Where Counsel Disagree.—

In accord with original. See Hall v. Hall, 235 N. C. 711, 71 S. E. (2d) 471 (1952).

Supreme Court order granting time in which to serve statement of case on appeal.—See same catchline under § 1-282.

Where there is no proper statement of case on appeal, the Supreme Court can determine only whether there is error on the face of the record. Wiggins v. Tripp, 253 N. C. 171, 116 S. E. (2d) 355 (1960); Twiford v. Harrison, 260 N.C. 217, 132 S.E.2d 321 (1963).

Applied in State v. Stubbs, 265 N.C. 420, 144 S.E.2d 262 (1965).

Cited in Richardson v. Cooke, 238 N. C. 449, 78 S. E. (2d) 208 (1953); Conrad v. Conrad, 252 N. C. 412, 113 S. E. (2d) 912 (1960); Wagner v. Eudy, 257 N. C. 199, 125 S. E. (2d) 598 (1962).

§ 1-284. Clerk to prepare transcript.

Procedure Generally.—See same catchline in note to § 1-282, analysis line II.

§ 1-285. Undertaking on appeal; filing; waiver.

This section has no application to appeals from a justice of the peace to the superior court. Massenburg v. Fogg, 256 N. C. 703, 124 S. E. (2d) 868 (1962).

Cited in Richardson v. Cooke, 238 N. C. 449, 78 S. E. (2d) 208 (1953).

§ 1-287.1. Dismissal of appeals to Supreme Court when statement of case not served within time allowed.—When it appears to the superior court that statement of case on appeal to the Supreme Court has not been served on the appellee or his counsel within the time allowed, it shall be the duty of the superior court judge, upon motion by the appellee, to enter an order dismissing such appeal; provided the appellant has been given at least five (5) days' notice of such motion. The motion herein provided for may be heard by either the resident judge, the presiding judge, a special judge residing within the district, or the judge assigned to hold the courts of the district, in term or out of term, in any county of the district. The provisions of this section shall not apply in any case in which a sentence of death has been pronounced. The provisions of this section shall not apply in any case with respect to which there is no requirement to serve a case on appeal. The provisions of this section are not exclusive but are

in addition to any other procedures for obtaining the dismissal of a case on appeal to the Supreme Court. (1959, c. 743; 1965, c. 136.)

Editor's Note.—The 1965 amendment substituted "superior court judge" for "presiding judge" in the first sentence and added the present second sentence.

Appeal from County Civil Court.—This section relates to the dismissal of an appeal from the superior court to the Supreme Court. If applicable under any circumstances to an appeal from a county civil court to the superior court, it could apply only to a motion to dismiss addressed to the county civil court. Pendergraft v. Harris, 267 N.C. 396, 148 S.E.2d 272 (1966).

Appeal Is Subject to Dismissal in Superior Court.—Where the case on appeal is not served within the time allowed, it is subject to dismissal in the superior court pursuant to this section, without moving to docket and dismiss in the Supreme Court. Williams v. Asheville Contracting Co., 257 N. C. 769, 127 S. E. (2d) 554 (1962).

But Section Does Not Apply When Case Has Been Docketed in Supreme Court.—This section does not apply when the case on appeal has been docketed in the Supreme Court. Leggett v. Smith-Douglass Co., Inc., 257 N. C. 646, 127 S. E. (2d) 222 (1962).

When the case on appeal has been docketed in the Supreme Court the appeal may not be withdrawn without the approval of the Supreme Court. Leggett v. Smith-Douglass Co., Inc., 257 N. C. 646, 127 S. E. (2d) 222 (1962)

Effect of Abandoning Appeal.—When an appeal is abandoned or not perfected within the time allowed, the order of the lower court sustaining a demurrer and dismissing the action becomes the law of the case and the plaintiff is thereby precluded from amending his complaint which ordinarily may be done when a demurrer is sustained without dismissing the action. Williams v. Asheville Contracting Co., 257 N. C. 769, 127 S. E. (2d) 554 (1962).

Applied in Edwards v. Edwards, 261 N.C. 445, 135 S.E.2d 18 (1964); State v. Fowler, 266 N.C. 528, 146 S.E.2d 418 (1966); Pelaez v. Carland, 268 N.C. 192, 150 S.E.2d 201 (1966).

Cited in Conrad v. Conrad, 252 N. C. 412, 113 S. E. (2d) 912 (1960).

§ 1-288. Appeals in forma pauperis; clerk's fees.

Section Mandatory.—

In accord with 2nd paragraph in original. See Dobson v. Johnson, 237 N. C. 275, 74 S. E. (2d) 652 (1953); Anderson v. Worthington, 238 N. C. 577, 78 S. E. (2d) 333 (1953)

In accord with 3rd paragraph in original. See Dobson v. Johnson, 237 N. C. 275, 74 S. E. (2d) 652 (1953); Prevatte v. Prevatte, 239 N. C. 120, 79 S. E. (2d) 264 (1953).

Failure to Obtain Order Allowing Appeal.—Where the judge writes on the judgment that plaintiff shall be allowed to appeal in forma pauperis upon compliance with this section, but plaintiff obtains no order allowing appeal in forma pauperis after the filing of an affidavit of poverty subsequent to the term, the appeal must be dismissed for failure to comply with the mandatory provision of this section. Prevatte v. Prevatte, 239 N. C. 120, 79 S. E. (2d) 264 (1953).

Order Must Be Obtained within Statutory Time.—

Where application to the clerk of the superior court, supported by affidavit and certificate, for leave to appeal in forma pauperis, was not made until more than ten days after expiration of the term of court at which the judgment was rendered, the appeal must be dismissed, the requirements of this section being mandatory and jurisdictional. Anderson v. Worthington, 238 N. C. 577, 78 S. E. (2d) 333 (1953).

Application May Be Made to either Trial Judge or Clerk.—Under this section, the party aggrieved by the judgment of the superior court may apply to either the trial judge or the clerk of the superior court for leave to appeal to the Supreme Court in forma pauperis. Anderson v. Worthington, 238 N. C. 577, 78 S. E. (2d) 333 (1953)

Cited in Richardson v. Cooke, 238 N. C. 449, 78 S. E. (2d) 208 (1953).

§ 1-289. Undertaking to stay execution on money judgment.

Applied in Jim Walter Corp. v. Gilliam, 260 N.C. 211, 132 S.E.2d 313 (1963).

§ 1-294. Scope of stay; security limited for fiduciaries.

When Proceedings Not Stayed by Interlocutory Appeal.—

An attempted appeal from a nonappealable interlocutory order is a nullity and does not divest the superior court of jurisdiction to proceed in the action. Cox v. Cox, 246 N. C. 528, 98 S. E. (2d) 879 (1957).

Question of Sufficiency of Defense Bond. —Where a complaint states a cause of action for the recovery of real property, the question of the sufficiency of the defense bond required by § 1-111 is "a matter included in the action," which is not affected in a legal sense by a motion of the defendant to strike the reply. Scott v. Jordan, 235 N. C. 244, 69 S. E. (2d) 557 (1952).

Order Allowing Plaintiff to File Amended Complaint. — The pendency of an appeal from an order allowing plaintiff to file an amended complaint does not deprive the superior court of jurisdiction to appoint a receiver based on allegations in the amended complaint. York v. Cole, 251 N. C. 344, 111 S. E. (2d) 334 (1959).

§ 1-297. Judgment on appeal and on undertakings; restitution.

Technical, Formal or Trivial Defects.— A new trial will not be awarded for mere technical error when it appears that the jury could not have been misled thereby. Burleson v. Helton, 258 N. C. 782, 129 S. E. (2d) 491 (1963).

§ 1-298. Procedure after determination of appeal.

Section applies only to judgments of superior court which have been affirmed or modified on appeal. D & W, Inc. v. City of Charlotte, 268 N.C. 720, 152 S.E.2d 199 (1966).

It has no application to decision of Supreme Court reversing judgment of lower court. D & W, Inc. v. City of Charlotte, 268 N.C. 720, 152 S.E.2d 199 (1966).

§ 1-299. Appeal from justice heard de novo; judgment by default; appeal dismissed.—When an appeal is taken from the judgment of a justice of the peace to a superior court, it shall be therein reheard, on the original papers, and no copy thereof need be furnished for the use of the appellate court. An issue shall be made up and tried by a jury at the first term to which the case is returned, unless continued, and judgment shall be given against the party cast and his sureties. When the defendant defaults, the plaintiff in actions instituted on a single bond, a covenant for the payment of money, bill of exchange, promissory note, or a signed account, shall have judgment, and in other cases may have his inquiry of damages executed forthwith by a jury. If the appellant fails to have his appeal docketed as required by law, the appellee may, at the term of court next succeeding the term to which the appeal is taken, have the case placed upon the docket, and upon motion the judgment of the justice shall be affirmed and judgment rendered against the appellant, and for the costs of appeal and against his sureties upon the undertaking, if there are any, according to the conditions thereof. Nothing herein prevents the granting the writ of recordari in cases now allowed by law. Whenever such appeal is docketed and is regularly set for trial, and the appellant, whether plaintiff or defendant, fails to appear and prosecute his appeal, the presiding judge may have the appellant called and the appeal dismissed; and in such case the judgment of the justice of the peace shall be affirmed. (1777, c. 115, s. 63, P. R.; 1794, c. 414, P. R.; R. C., c. 31, s. 105; C. C. P., s. 540; Code, ss. 565, 881; 1889, c. 443; Rev., ss. 607, 609; C. S., s. 660; 1955, c. 256.)

I. GENERAL CONSIDERATION.

Editor's Note. — The 1955 amendment added the last sentence.

Cited in Edwards v. Edwards, 261 N.C. 445, 135 S.E.2d 18 (1964).

IV. DISMISSAL FOR FAILURE TO DOCKET—RECORDARI.

Laches in Applying for Recordari.— In accord with original. See Clements v Booth, 244 N. C. 474, 94 S. E. (2d) 365 (1956).

§ 1-300. Appeal from justice docketed for trial de novo.

Duty of Appellant to See Case Properly Docketed.—

In accord with original. See Clements v. Booth, 244 N. C. 474, 94 S. E. (2d) 365 (1956).

SUBCHAPTER X. EXECUTION.

Article 28.

Execution.

§ 1-302. Judgment enforced by execution.

Cited in Safeco Ins. Co. of America v. Nationwide Mut. Ins. Co., 264 N.C. 749, 142 S.E.2d 694 (1965).

§ 1-303. Kinds of; signed by clerk; when sealed.

Execution on Certificate of Commissioner of Revenue.—See note to § 1-307.

§ 1-305. Clerk to issue, in six weeks; penalty. — The clerk of the superior court shall issue executions on all unsatisfied judgments rendered in his court, which are in full force and effect, upon the request of any party or person entitled thereto and upon payment of the necessary fees; provided, however, that the clerks of the superior court shall issue executions on all judgments rendered in their respective courts on forfeiture of bonds in criminal cases within six weeks of the rendition of the judgment, without any request or any advance payment of fees. Every clerk who fails to comply with the requirements of this section is liable to be amerced in the sum of one hundred dollars for the benefit of the party aggrieved, under the same rules that are provided by law for amercing sheriffs, and is further liable to the party injured by suit upon his bond. (1850, c. 17, ss. 1, 2, 3; R. C., c. 45, s. 29; Code, s. 470; Rev., s. 618; C. S., s. 666; 1953, c. 470; 1959, c. 1295.)

Editor's Note. — The 1953 amendment rewrote the former first two sentences to appear as the present first sentence. For comment on amendment, see 31 N. C. Law Rev. 397.

The 1959 amendment substituted "rendered" for "docketed" in line two.

§ 1-306. Enforcement as of course.

Procedure for Obtaining New Judgment. —Under the proviso in this section no execution upon any judgment for money may be issued after 10 years of the date of the rendition thereof, and the only procedure whereby the owner of the judgment may obtain a new judgment for the amount is by independent action upon the judgment, commenced by the issuance of summons, filing of complaint, service thereof, etc., as in case of any other action to recover judgment on debt, which action must, under § 1-47, be commenced within 10 years from the date of the rendition of the judgment. Reid v. Bristol, 241 N. C. 699, 86 S. E. (2d) 417 (1955).

The concept of a dormant judgment and scire facias for leave to issue execution thereon is now obsolete. Reid v. Bristol, 241 N. C. 699, 86 S. E. (2d) 417 (1955).

§ 1-307. Issued from and returned to court of rendition.

May Issue Only from Court Rendering Judgment.—

In accord with original. See Daniels v. Yelverton, 239 N. C. 54, 79 S. E. (2d) 311 (1953).

Execution on Certificate of Commissioner of Revenue.—Where the Commissioner of Revenue has the clerk of a superior court docket his certificate setting forth the tax due by a resident of the county pursuant to § 105-242(3), execution on such judgment directed to the sheriff of the county must be issued by the clerk of the superior court of the county, or in his name by a deputy or assistant clerk, and it cannot be issued by the Commissioner of Revenue. Daniels v. Yelverton, 239 N. C. 54, 79 S. E. (2d) 311 (1953).

§ 1-308 To what counties issued.—When the execution is against the property of the judgment debtor, it may be issued to the sheriff of any county where the judgment is docketed. No execution may issue from the superior court upon any judgment until such judgment shall be docketed in the county to which the execution is to be issued. When it requires the delivery of real or personal property, it must be issued to the sheriff of the county where the property, or some part thereof, is situated. Execution may be issued at the same time to different counties. (C. C. P., s. 259; 1871-2, c. 74; 1881, c. 75; Code, s. 443; 1905, c. 412; Rev., s. 622; C. S., s. 670; 1953, c. 884.)

Editor's Note. —

The 1953 amendment, effective July 1, 1953, rewrote the second sentence.

§ 1-310. When dated and returnable. — Executions shall be dated as of the day on which they were issued, and shall be returnable to the court from which they were issued not more than ninety days from said date, and no executions against property shall issue until the end of the term during which judgment was rendered. (1870-1, c. 42, s. 7; 1873-4, c. 7; Code s. 449; 1903, c. 544; Rev., s. 624; C. S., s. 672; 1927, c. 110; 1931, c. 172; 1953, c. 697.)

Editor's Note. —

The 1953 amendment struck out the words "less than forty nor," which formerly appeared between the words "not" and "more" in line three. For comment on amendment, see 31 N. C. Law Rev. 397.

The term "return" implies that the process is taken back, with such endorsements as the law requires, to the place from which it originated. Brogden Produce Co. v. Stanley, 267 N.C. 608, 148 S.E.2d 689 (1966).

§ 1-311. Against the person.

General Doctrine.—

If a judgment is rendered against a defendant for a cause of action specified in § 1-410 (1), this section authorizes an execution against the person of the judgment debtor after the return of an execution against his property wholly or partly unsatisfied. Allred v. Graves, 261 N.C. 31, 134 S.E.2d 186 (1964).

Three Classes of Cases Contemplated.—

This section contemplates three classes whereby execution may be had on the body: (1) Where the cause of arrest does not appear in the complaint, but appears by affidavit; (2) where the cause of arrest is set forth in the complaint, but is based on facts which are collateral and extrinsic to plaintiff's cause of action; and (3) where the facts showing the cause of arrest as set forth in the complaint are the same or essential to those on which plaintiff bases his cause of action. Nunn v. Smith, 270 N.C. 374, 154 S.E.2d 497 (1967).

Necessity for Sufficient Allegations.—An essential prerequisite to plaintiff's right to body execution is that, where there has not already been a lawful arrest under § 1-410, the complaint or affidavit must allege such facts as would have justified an order for such arrest. Nunn v. Smith, 270 N.C. 374, 154 S.E.2d 497 (1967).

Necessity of Recovery of Judgment.—An execution against the person cannot issue simply because of allegations in the complaint. The facts alleged entitling the plaintiff to such an execution must be passed upon and must enter into the judgment. Nunn v. Smith, 270 N.C. 374, 154 S.E.2d 497 (1967).

Effect of execution.—The effect of an execution against the person is to deprive the defendant in the execution entirely of his homestead exemption and of any personal property exemption over and above fifty dollars. Allred v. Graves, 261 N.C. 31, 134 S.E.2d 186 (1964).

Privilege against Self-Incrimination Inapplicable Where Remedy under This Section Relinquished.—In an action for malicious assault, if plaintiff seeks merely compensatory damages, and relinquishes all claim to punish defendants by punitive damages and to arrest them by virtue of the provisions of § 1-410 (1) and to issue an execution against their persons by virtue of the provisions of this section, defendants' claim of privilege against self-incrimination does not apply. Allred v. Graves, 261 N.C. 31, 134 S.E.2d 186 (1964).

Discharge, etc.—

When a person is taken by authority of an execution against his person by virtue of the provisions of this section, he can be discharged from imprisonment only by payment or giving notice and surrender

of all his property in excess of fifty dollars as provided in § 23-23 and §§ 23-30 through 23-38. Allred v. Graves, 261 N.C. 31, 134 S.E.2d 186 (1964).

The provisions of § 23-29 (2) are broad and strong, and plainly extend to and embrace every person who may be arrested by virtue of an order of arrest issued pursuant to the provisions of § 1-410, and also extend to and embrace every person who has been seized by virtue of an execution against his person by authority of the provisions of this section. Allred v. Graves, 261 N.C. 31, 134 S.E.2d 186 (1964).

§ 1-313. Form of execution.

Liens on Real Estate and Personalty Distinguished.— A judgment creditor acquires a lien on the judgment debtor's real estate by docketing. But he acquires no lien on the personalty until there has been a valid levy. Community Credit Co. of Lenoir, Inc. v. Norwood, 257 N. C. 87, 125 S. E. (2d) 369 (1962).

To make a valid levy the officer must be armed with judicial process and he must act in conformity with the direction given him in the execution or other judicial order. Community Credit Co. of Lenoir, Inc. v. Norwood, 257 N. C. 87, 125 S. E. (2d) 369 (1962).

Duty to Report Levy on Automobile.— When a levy has been made on an automobile pursuant to an execution, it is now the duty of the officer to report the levy to the Department of Motor Vehicles in a form prescribed by it. The levy so reported is subordinate to all liens theretofore noted on the certificate by the Department. Community Credit Co. of Lenoir Inc. v. Norwood, 257 N. C. 87, 125 S. E. (2d) 369 (1962).

§ 1-315. Property liable to sale under execution; bill of sale.—(a) The following property of the judgment debtor, not exempted from sale under the Constitution and laws of this State, may be levied on and sold under execution:

(1) Goods, chattels, and real property belonging to him.
(2) Leasehold estates of three years duration or more owned by him.
(3) Equitable and legal rights of redemption in personal and real property pledged or mortgaged by him, or transferred to a trustee for security by him.
(4) Real property or goods and chattels of which any person is seized or possessed in trust for him.
(5) Choses in action represented by instruments which are indispensable to the chose in action.
(6) Choses in action represented by indispensable instruments, which are secured by any interest in property, together with the security interest in property.
(7) Interests as vendee under conditional sales contracts of personal property.

(b) Upon the sale under execution of any property or interest for which no provision is otherwise made under this article for the furnishing of a deed or other instrument of title, the officer holding the sale shall execute and deliver to the purchaser a bill of sale.

(c) No execution shall be levied on growing crops until they are matured. (5 Geo. II, c. 7, s. 4; 1777, c. 115, s. 29, P. R.; 1812, c. 830, ss. 1, 2, P. R.; 1822, c. 1172, P. R.; 1844, c. 35; R. C., c. 45, ss. 1-5, 11; Code, ss. 450, 453; Rev., ss. 629, 632; 1919, c. 30; C. S., s. 677; 1961, c. 81.)

Editor's Note.—The 1961 amendment, effective July 1, 1961, enlarged the kinds of property subject to sale under execution and added the provision for a bill of sale.

Only property of the judgment debtor may be levied on and sold under execution. A levy made on property of a person other than the judgment debtor constitutes a trespass. Mica Industries, Inc. v. Penland, 249 N. C. 602, 107 S. E. (2d) 120 (1959).

Applicable to Passive Trusts.—The provisions of subsection (4) of this section and § 1-316 do not apply to an active trust. Cornelius v. Albertson, 244 N. C. 265, 93 S. E. (2d) 147 (1956).

The common law rule that only property of which the judgment debtor has

legal title is subject to sale under execution has been enlarged by statute to include property held for the benefit of the judgment debtor in a passive trust, but even so, the trustee must be brought in by supplemental proceeding under G. S. 1-360 et seq. Cornelius v. Albertson, 244 N. C. 265, 93 S. E. (2d) 147 (1956).

Applied in Grabenhofer v. Garrett, 260 N. C. 118, 131 S. E. (2d) 675 (1963).

§ 1-316. Sale of trust estates; purchaser's title.

Cross Reference.—See note to § 1-315.

Application to Certain Trusts Only.—In accord with original. See Cornelius v. Albertson, 244 N. C. 265, 93 S. E. (2d) 147 (1956).

§ 1-324.1. Judgment against corporation; property subject to execution.—If a judgment is rendered against a corporation, the plaintiff may sue out such executions against its property as is provided by law to be issued against the property of natural persons, which executions may be levied as well on the current money as on the goods, chattels, lands and tenements of such corporation. (1901, c. 2, s. 66; Rev., s. 1212; C. S., s. 1201; 1955, c. 1371, s. 2.)

Editor's Note.—Session Laws 1955, c. 1371, s. 2, effective July 1, 1957, transferred former G. S. 55-140 through 55-146 to appear as this and the six following sections. Until said date they were effective as article 12 of chapter 55 of the General Statutes.

§ 1-324.2. Agent must furnish information as to corporate officers and property.—Every agent or person having charge or control of any property of the corporation, on request of a public officer having for service a writ of execution against it, shall furnish to him the names of the directors and officers thereof, and a schedule of all its property, including debts due or to become due, so far as he has knowledge of the same. (1901, c. 2, s. 67; Rev., s. 1213; C. S., s. 1202; 1955, c. 1371, s. 2.)

§ 1-324.3. Shares subject to execution; agent must furnish information.—Any share or interest in any bank, insurance company, or other joint stock company, that is or may be incorporated under the authority of this State, or incorporated or established under the authority of the United States, belonging to the defendant in execution, may be taken and sold by virtue of such execution in the same manner as goods and chattels. The clerk, cashier, or other officer of such company who has at the time the custody of the books of the company shall, upon being shown the writ of execution, give to the officer having it a certificate of the number of shares or amount of the interest held by the defendant in the company; and if he neglects or refuses to do so, or if he wilfully gives a false certificate, he shall be liable to the plaintiff for the amount due on the execution, with costs. (1901, c. 2, ss. 69, 70; Rev., ss. 1214, 1215; C. S., s. 1203; 1955, c. 1371, s. 2.)

§ 1-324.4. Debts due corporation subject to execution; duty, etc., of agent.—If an officer holding an execution is unable to find other property belonging to the corporation liable to execution, he or the judgment creditor may elect to satisfy such execution in whole or in part out of any debts due the corporation; and it is the duty of any agent or person having custody of any evidence of such debt to deliver it to the officer, for the use of the creditor and such delivery, with a transfer to the officer in writing, for the use of the creditor, and notice to the debtor, shall be a valid assignment thereof; and the creditor may sue for and collect the same in the name of the corporation, subject to such equitable set-offs on the part of the debtor as in other assignments. Every agent or person who neglects or refuses to comply with the provisions of this section and G. S. 1-324.2 is liable to pay to the execution creditor the amount due on the execution, with costs. (1901, c. 2, s. 68; Rev., s. 1216; C. S., s. 1204; 1955, c. 1371, s. 2.)

The term "debts" is used in this section in a restricted sense. Any agent or person having custody must deliver any evidence of such debt to the officer with a transfer

to the officer in writing, and notice to the creditor shall be a valid assignment thereof. Nothing in the statute gives authority to a creditor to maintain an action in the name of the corporation for the recovery of damages for tortious breach of trust by officers in their dealings with the corporation. Caldlaw Inc. v. Caldwell, 248 N. C. 235, 102 S. E. (2d) 829 (1958), construing former § 55-143.

And Does Not Include Unliquidated Claim for Damages for Breach of Trust. —A judgment creditor of a corporation whose judgment is unsatisfied may bring suit in the name of the corporation only for the purpose of collecting a debt due the corporation for the satisfaction of his claim, and an unliquidated claim against an officer of the corporation to recover damages for tortious breach of trust by such officer in his dealings with the corporation arises ex delicto and is an action in tort, and the statute does not authorize a judgment creditor to maintain such suit in the name of the corporation against such officer. Caldlaw, Inc. v. Caldwell, 248 N. C. 235, 102 S. E. (2d) 829 (1958), construing former § 55-143.

§ 1-324.5. Violations of three preceding sections misdemeanor. — If any agent or person having charge or control of any property of a corporation, or any clerk, cashier, or other officer of a corporation, who has at the time the custody of the books of the company, or if any agent or person having custody of any evidence of debt due to a corporation, shall, on request of a public officer having in his hands for service an execution against the said corporation, wilfully refuse to give to such officer the names of the directors and officers thereof, and a schedule of all its property, including debts due or to become due, or shall willfully refuse to give to such officer a certificate of the number of shares, or amount of interest held by such corporation in any other corporation, or shall wilfully refuse to deliver to such officer any evidence of indebtedness due or to become due to such corporation, he shall be guilty of a misdemeanor. (1901, c. 2, ss. 67, 68, 70; Rev., s. 3690; C. S., s. 1205; 1955, c. 1371, s. 2.)

§ 1-324.6. Proceedings when custodian of corporate books is a nonresident.—When the clerk, cashier, or other officer of any corporation incorporated under the laws of this State, who has the custody of the stock-registry books, is a nonresident of the State, it is the duty of the sheriff receiving a writ of execution issued out of any court of this State against the goods and chattels of a defendant in execution holding stock in such company to send by mail a notice in writing, directed to the nonresident clerk, cashier, or other officer at the post office nearest his reputed place of residence, stating in the notice that he, the sheriff, holds the writ of execution, and out of what court, at whose suit, for what amount, and against whose goods and chattels the writ has been issued, and that by virtue of such writ he seizes and levies upon all the shares of stock of the company held by the defendant in execution on the day of the date of such written notice. It is also the duty of the sheriff on the day of mailing the notice to affix and set upon any office or place of business of such company, within his county, a like notice in writing, and on the same day to serve like notice in writing upon the president and directors of the company, or upon such of them as reside in his county, either personally or by leaving the same at their respective places of abode. The sending, setting up, and serving of such notices in the manner aforesaid constitute a valid levy of the writ upon all shares of stock in such company held by the defendant in execution, which have not at the time of the receipt of the notice by the clerk, cashier, or other officer, who has custody of the stock-registry books, been actually transferred by the defendant; and thereafter any transfer or sale of such shares by the defendant in execution is void as against the plaintiff in the execution, or any purchaser of such stock at any sale thereunder. (1901, c. 2, s. 71; Rev., s. 1217; C. S., s. 1206; 1955, c. 1371, s. 2.)

§ 1-324.7. Duty and liability of nonresident custodian. - The nonresident clerk, cashier, or other officer in such corporation, to whom notice in writing is sent as prescribed in G. S. 1-324.6, shall send forthwith to the officer

having the writ, a statement of the time when he received the notice and a certificate of the number of shares held by the defendant in the corporation at the time of the receipt, not actually transferred on the books of the corporation, and the sheriff, or other officer, on receipt by him of this certificate, shall insert the number of shares in the inventory attached to the writ. If the clerk, cashier, or other officer in such corporation neglects to send the certificate as aforesaid or willfully sends a false one, he is liable to the plaintiff for double the amount of damages occasioned by his neglect, or false certificate, to be recovered in an action against him, but the neglect to send, or miscarriage of the certificate, does not impair the validity of the levy upon the stock. (1901, c. 2, s. 72; Rev., s. 1218, C. S., s. 1207; 1955, c. 1371, s. 2.)

ARTICLE 29A.

Judicial Sales.

Part 1. General Provisions.

§ 1-339.1. Definitions.

Cross References.—As to execution sales, see §§ 1-339.41 to 1-339.71. As to sales under power of sale, see §§ 45-21.1 to 45-21.33.

Cited in Certain-Teed Prods. Corp. v. Sanders, 264 N.C. 234, 141 S.E.2d 329 (1965).

§ 1-339.3a. **Judge or clerk may order public or private sale.**—The judge or clerk of the superior court having jurisdiction has authority in his discretion to determine whether a sale of either real or personal property shall be a public or private sale. Any private sale conducted under an order issued prior to July 1, 1955 by a judge or clerk of the superior court having jurisdiction is hereby validated as to the order that such sale be a private sale. (1955, c. 74.)

Editor's Note.—The act inserting this section became effective July 1, 1955.

§ 1-339.8. **Public sale of separate tracts in different counties.**

(d) When real property is sold in a county other than the county where the proceeding, in which the sale was ordered, is pending, the person authorized to hold the sale shall cause a certified copy of the order of confirmation to be recorded in the office of the register of deeds of the county where such property is situated, and it shall not be necessary for the clerk of court to probate said certified copy of the order of confirmation. (1949, c. 719, s. 1; 1965, c. 805.)

Editor's Note. — The 1965 amendment substituted "order of confirmation" for "order of sale" in subsection (d) and added the language following "situated" in that subsection. As the rest of the section was not affected by the amendment, it is not set out.

Part. 2. Procedure for Public Sales of Real and Personal Property.

§ 1-339.17. **Public sale; posting and publishing notice of sale of real property.**—(a) The notice of public sale of real property shall

(1) Be posted, at the courthouse door in the county in which the property is situated, for thirty days immediately preceding the sale,

(2) And in addition thereto,

a. If a newspaper qualified for legal advertising is published in the county, the notice shall be published in such a newspaper once a week for at least four successive weeks, but

b. If no such newspaper is published in the county, then notice shall be published once a week for at least four successive weeks in a newspaper having a general circulation in the county.

(b) When the notice of public sale is published in a newspaper,

(1) The period from the date of the first publication to the date of the last publication, both dates inclusive, shall not be less than twenty-two days, including Sundays, and

(2) The date of the last publication shall be not more than 10 days preceding the date of the sale.

(1965, c. 41; 1967, c. 979, s. 1.)

Editor's Note.— Prior to the 1965 amendment, effective Sept. 1, 1965, paragraph b of subdivision (2) of subsection (a) provided for posting the notice at three other public places in the county.

The 1967 amendment, effective Oct. 1, 1967, substituted "be not more than 10" for "not be more than seven" in subdivision (2) of subsection (b).

As only subsections (a) and (b) were changed by the amendments, the rest of the section is not set out.

Section 4 of c. 979, Session Laws 1967, provides: "This act does not amend the Uniform Commercial Code as enacted in this State. The application of statutes herein included or amended insofar as they relate to transactions subject to the Uniform Commercial Code as enacted in this State shall be in accordance with article 10 of chapter 25, of the General Statutes."

Person Interested in Notices Is Invitee. —A person interested in notices posted in the courthouse pursuant to this section is not a mere licensee but an invitee when on the courthouse premises. Walker v. Randolph County, 251 N. C. 805, 112 S. E. (2d) 551 (1960).

§ 1-339.25. Public sale; upset bid on real property; compliance bond.—(a) An upset bid is an advanced, increased or raised bid whereby a person offers to purchase real property theretofore sold, for an amount exceeding the reported sale price by ten percent (10%) of the first $1000 thereof plus five percent (5%) of any excess above $1000, but in any event with a minimum increase of $25, such increase being deposited in cash, or by certified check or cashier's check satisfactory to the said clerk, with the clerk of the superior court, with whom the report of the sale was filed, within ten days after the filing of such report; such deposit to be made with the clerk of superior court before the expiration of the tenth day, and if the tenth day shall fall upon a Sunday or holiday, or upon a day in which the office of the clerk is not open for the regular dispatch of its business, the deposit may be made on the day following when said office is open for the regular dispatch of its business. An upset bid need not be in writing, and the timely deposit with the clerk of the required amount, together with an indication to the clerk as to the sale to which it is applicable, is sufficient to constitute the upset bid, subject to the provisions of subsection (b).

(1963, c. 858; 1967, c. 979, s. 1.)

Editor's Note. — The 1963 amendment, effective Jan. 1, 1964, inserted the part of the first sentence of subsection (a) that follows the semicolon. As only this subsection was affected by the amendment the rest of the section is not set out.

The 1967 amendment, effective Oct. 1, 1967, inserted "or by certified check or cashier's check satisfactory to the said clerk" in the first sentence of subsection (a).

As only subsection (a) was affected by the amendments, the rest of the section is not set out.

Section 4 of c. 979, Session Laws 1967, provides: "This act does not amend the Uniform Commercial Code as enacted in this State. The application of statutes herein included or amended insofar as they relate to transactions subject to the Uniform Commercial Code as enacted in this State shall be in accordance with article 10 of chapter 25, of the General Statutes."

Upset Bid to Be in Amount Specified.— An upset bid in a private sale of real property shall be submitted to the court within ten days after the filing of the report of sale, and shall be in an amount specified by this section. Wadsworth v. Wadsworth, 260 N.C. 702, 133 S.E.2d 681 (1963).

Discretion of Court. — Whether to accept a cash bid or order another sale, thus releasing the cash bidder, calls for the exercise of judicial discretion and the refusal to order another sale upon an upset bid of the owners of the minority interest in the land, secured not by cash or bond, but only by their interest in the land

which was subject to liens in an undisclosed amount, will be affirmed as a proper exercise of judicial discretion by the court. Galloway v. Hester, 249 N. C. 275, 106 S. E. (2d) 241 (1958).

Advance Bid Held Not to Meet Requirements of Section. — An advance bid entered by the owners of a minority interest in the land and not supported by a cash deposit or bond but only by the interest of the advance bidders in the land, which interests are subject to deeds of trust, judgments and tax liens in an undisclosed amount, does not meet, at least technically, the requirements of this section for an advance bid. Galloway v. Hester, 249 N. C. 275, 106 S. E. (2d) 241 (1958).

§ 1-339.27. Public sale; resale of real property; jurisdiction; procedure.

Upon the filing of an upset bid under § 1-339.36 (a), this section applies, and to all intents and purposes the sale thereafter becomes a public sale and is subject to the statutory requirements of resale. Wadsworth v. Wadsworth, 260 N.C. 702, 133 S.E.2d 681 (1963).

When an upset bid in a private sale is submitted to the court, a resale shall be ordered; a notice of the resale shall be posted at the courthouse door for fifteen days immediately preceding the sale and published in a newspaper once a week for two successive weeks. Wadsworth v. Wadsworth, 260 N.C. 702, 133 S.E.2d 681 (1963).

§ 1-339.30. Public sale; failure of bidder to make cash deposit or to comply with bid; resale.

The doctrine of caveat emptor applies to a judicial sale, and while the court has equity jurisdiction to protect the purchaser from imposition because of fraud or mistake, when the evidence discloses that the parties had equal opportunity to discover the facts, that the description set out in the petition for sale was of record for more than a year prior to the bid, and that the purchaser was familiar with the property and did not ask for a survey, such purchaser may not seek relief from his bid on the ground of shortage in acreage or lack of access to the property. Walton v. Cagle, 269 N.C. 177, 152 S.E.2d 312 (1967).

Tender of Deed.—The commissioner is required by this section to tender a deed for the property or make a bona fide attempt to tender such deed. Walton v. Cagle, 269 N.C. 177, 152 S.E.2d 312 (1967).

Where the highest bidder was served with notice on 27 June 1966 that the commissioner would move on 12 July 1966 that the highest bidder comply with the terms of sale, this indicated that the commissioner, who was under order of court to convey upon receipt of purchase price, stood ready, willing and able to comply with the terms of the order. No further tender was necessary when the bidder failed to comply, since the law does not require the doing of a vain thing. Walton v. Cagle, 269 N.C. 177, 152 S.E.2d 312 (1967).

Order Held Not a Void Conditional Judgment.—Order issued in a judicial sale proceeding that, upon refusal of the last and highest bidder to comply with his bid, the land should be resold and that the defaulting bidder be held liable for the costs and for any amount that the final sale price is less than his bid, is not a void conditional judgment, since it is unequivocal and the determination of the liability is a simple matter of arithmetic and an administrative duty, and such order is a final judgment deciding the matter on its merits without need for futher direction of the court. Walton v. Cagle, 269 N.C. 177, 152 S.E.2d 312 (1967).

Part 3. Procedure for Private Sales of Real and Personal Property.

§ 1-339.33. Private sale; order of sale.

Discretion, etc.—

Under the former statute, the court having jurisdiction might, in the exercise of its discretion, order a sale of land where minors were interested and represented by guardian ad litem, either at public or private sale. The court has similar discretion under this section. Wadsworth v. Wadsworth, 260 N.C. 702, 133 S.E.2d 681 (1963).

Section does not specify conditions under which a private sale may be ordered. Wadsworth v. Wadsworth, 260 N.C. 702, 133 S.E.2d 681 (1963).

Hence, it is a discretionary matter for the court in a particular case. Wadsworth v. Wadsworth, 260 N.C. 702, 133 S.E.2d 681 (1963).

Court May Lay Down Guide Lines and Give Directions.—There is nothing in this

section which restricts the court in laying down guide lines and giving directions for the making of a private sale in the first instance. Indeed, it is the duty of the court to give directions to the commissioner. Wadsworth v. Wadsworth, 260 N.C. 702, 133 S.E.2d 681 (1963).

Sale of Timber.—In the sale of large bodies of timber, a commissioner, if permitted to sell privately, has freedom to canvass prospective buyers, give time for viewing and estimating the timber, and negotiate directly with prospects without being restricted by the formal requirements of a public sale. Wadsworth v. Wadsworth, 260 N.C. 702, 133 S.E.2d 681 (1963).

§ 1-339.36. Private sale; upset bid; subsequent procedure.

Every Private Sale Is Subject to Upset Bids.—Every private sale of real property under order of the court is subject to upset bids. Wadsworth v. Wadsworth, 260 N.C. 702, 133 S.E.2d 681 (1963).

Upon the filing of an upset bid under subsection (a), § 1-339.27 (a) applies, and to all intents and purposes the sale thereafter becomes a public sale and is subject to the statutory requirements of resale. Wadsworth v. Wadsworth, 260 N.C. 702, 133 S.E.2d 681 (1963).

When an upset bid in a private sale is submitted to the court, a resale shall be ordered, a notice of the resale shall be posted at the courthouse door for fifteen days immediately preceding the sale, and published in a newspaper once a week for two successive weeks. Wadsworth v. Wadsworth, 260 N.C. 702, 133 S.E.2d 681 (1963).

Section 1-339.25 Also Applies.—An upset bid in a private sale of real property shall be submitted to the court within ten days after the filing of the report of sale, and shall be in an amount specified by § 1-339.25. Wadsworth v. Wadsworth, 260 N.C. 702, 133 S.E.2d 681 (1963).

Article 29B.

Execution Sales.

Part 1. General Provisions.

§ 1-339.41. Definitions.

Cross References.—As to judicial sales, see §§ 1-339.1 to 1-339.40. As to sales under power of sale, see §§ 45-21.1 to 45-21.33.

Part 2. Procedure for Sale.

§ 1-339.51. Contents of notice of sale.

Statutes Contemplate Sale at Fair Value.—The statutes regulating execution sales contemplate a sale at which the thing sold will bring its fair value. Pittsburgh Plate Glass Co. v. Forbes, 258 N. C. 426, 128 S. E. (2d) 875 (1963).

§ 1-339.52. Posting and publishing notice of sale of real property.

—(a) The notice of sale of real property shall

(1) Be posted, at the courthouse door in the county in which the property is situated, for thirty days immediately preceding the sale,

(2) And in addition thereto,

a. If a newspaper qualified for legal advertising is published in the county, the notice shall be published in such a newspaper once a week for at least four successive weeks; but

b. If no such newspaper is published in the county, then notice shall be published once a week for at least four successive weeks in a newspaper having general circulation in the county.

(b) When the notice of sale is published in a newspaper,

(1) The period from the date of the first publication to the date of the last publication, both dates inclusive, shall not be less than twenty-two days, including Sundays, and

(2) The date of the last publication shall be not more than 10 days preceding the date of the sale.

(c) When the real property to be sold is situated in more than one county, the provisions of subsections (a) and (b) shall be complied with in each county in which any part of the property is situated. (1949, c. 719, s. 1; 1967, c. 979, s. 2.)

Editor's Note.—The 1967 amendment, effective Oct. 1, 1967, rewrote paragraph b in subdivision (2) of subsection (a) and substituted "be not more than 10" for "not be more than seven" in subdivision (2) of subsection (b).

Section 4 of c. 979, Session Laws 1967, provides: "This act does not amend the Uniform Commercial Code as enacted in this State. The application of statutes herein included or amended insofar as they relate to transactions subject to the Uniform Commercial Code as enacted in this State shall be in accordance with article 10 of chapter 25, of the General Statutes."

§ 1-339.54. Notice to judgment debtor of sale of real property.

Effect of Noncompliance. — A failure to comply with this section, which is directory, will not render the sale void as against a stranger without notice of the irregularity, nor can it be assailed collaterally, but in such a case the defendant may, on motion, or by direct proceeding, have the sale vacated. Walston v. Applewhite & Co., 237 N. C. 419, 75 S. E. (2d) 138 (1953).

§ 1-339.64. **Upset bid on real property; compliance bond.**—(a) An upset bid is an advanced, increased or raised bid whereby a person offers to purchase real property theretofore sold, for an amount exceeding the reported sale price by ten percent (10%) of the first $1000 thereof plus five percent (5%) of any excess above $1000, but in any event with a minimum increase of $25, such increase being deposited in cash, or by certified check or cashier's check satisfactory to the said clerk, with the clerk of the superior court, with whom the report of the sale was filed, within ten days after the filing of such report; such deposit to be made with the clerk of superior court before the expiration of the tenth day, and if the tenth day shall fall upon a Sunday or holiday, or upon a day in which the office of the clerk is not open for the regular dispatch of its business, the deposit may be made on the day following when said office is open for the regular dispatch of its business. An upset bid need not be in writing, and the timely deposit with the clerk of the required amount, together with an indication to the clerk as to the sale to which it is applicable, is sufficient to constitute the upset bid, subject to the provisions in subsection (b).

(1967, c. 979, s. 2.)

Editor's Note.—The 1967 amendment, effective Oct. 1, 1967, inserted "or by certified check or cashier's check satisfactory to the said clerk" in the first sentence in subsection (a) and added at the end of that sentence the language following the semicolon.

As only subsection (a) was affected by the amendment, the rest of the section is not set out.

Section 4 of c. 979, Session Laws 1967, provides: "This act does not amend the Uniform Commercial Code as enacted in this State. The application of statutes herein included or amended insofar as they relate to transactions subject to the Uniform Commercial Code as enacted in this State shall be in accordance with article 10 of chapter 25, of the General Statutes."

§ 1-339.67. **Confirmation of sale of real property.**—No sale of real property may be consummated until the sale is confirmed by the clerk of the superior court. No order of confirmation may be made until the time for submitting an upset bid, pursuant to G.S. 1-339.64, has expired. (1949, c. 719, s. 1; 1967, c. 979, s. 2.)

Editor's Note.—The 1967 amendment, effective Oct. 1, 1967, substituted "G.S. § 1-339.64" for "G.S. § 1-339.65."

Section 4 of c. 979, Session Laws 1967, provides: "This act does not amend the Uniform Commercial Code as enacted in this State. The application of statutes herein included or amended insofar as they re-

late to transactions subject to the Uniform Commercial Code as enacted in this State shall be in accordance with article 10 of chapter 25, of the General Statutes."

When Clerk May Decline to Confirm Sale.—If competitive bidding is stifled, resulting in a bid less than the fair value of the property sold, the clerk may decline to confirm the sale. Pittsburgh Plate Glass Co. v. Forbes, 258 N. C. 426, 128 S. E. (2d) 875 (1963).

The high bidder acquires no right until his bid is accepted, and the sale confirmed. Pittsburgh Plate Glass Co. v. Forbes, 258 N. C. 426 128 S. E. (2d) 875 (1963).

Doctrine of Caveat Emptor.—While the doctrine of caveat emptor applies to purchasers at execution sales, it does not tie the hands of a court to prevent a manifest injustice not due to the fault or neglect of the purchaser. Pittsburgh Plate Glass Co. v. Forbes, 258 N. C. 426, 128 S. E. (2d) 875 (1963).

Applied in Priddy v. Kernersville Lumber Co., Inc., 258 N. C. 653, 129 S. E. (2d) 256 (1963).

§ 1-339.68. Deed for real property sold; property subject to liens; orders for possession.

(c) Orders for possession of real property sold pursuant to this article, in favor of the purchaser and against any party or parties in possession at the time of the sale who remain in possession at the time of application therefor, may be issued by the clerk of the superior court of the county in which such property is sold, when:

(1) The purchaser is entitled to possession, and
(2) The purchase price has been paid, and
(3) The sale or resale has been confirmed, and
(4) Ten days' notice has been given to the party or parties in possession at the time of the sale or resale who remain in possession at the time application is made, and
(5) Application is made to such clerk by the purchaser of the property.

(1949, c. 719, s. 1; 1967, c. 979, s. 2.)

Editor's Note.—The 1967 amendment, effective Oct. 1, 1967, added subsection (c).

As subsections (a) and (b) were not affected by the amendment, they are not set out.

Section 4 of c. 979, Session Laws 1967, provides: "This act does not amend the Uniform Commercial Code as enacted in this State. The application of statutes herein included or amended insofar as they relate to transactions subject to the Uniform Commercial Code as enacted in this State shall be in accordance with article 10 of chapter 25, of the General Statutes."

Rights and Estate Which May Be Sold.—A sheriff, acting pursuant to an execution, can only sell the rights and estate of the judgment debtor as they existed when the lien pursuant to which he acts became effective. Pittsburgh Plate Glass Co. v. Forbes, 258 N. C. 426, 128 S. E. (2d) 875 (1963).

Applied in Priddy v. Kernersville Lumber Co., Inc., 258 N. C. 653, 129 S. E. (2d) 256 (1963).

§ 1-339.69. Failure of bidder to comply with bid; resale.

Action by Execution Debtor against Defaulting Bidder.—If the amount bid is less than the amount of the debt, so that the execution debtor is entitled to no part of the price, the execution debtor is not entitled to bring an action to enforce the bid against a defaulting bidder, notwithstanding subsection (d) of this section, and the action is properly brought by the sheriff. Daniels v. Yelverton, 239 N. C. 54, 79 S. E. (2d) 311 (1953).

§ 1-339.71. Special proceeding to determine ownership of surplus.

—(a) A special proceeding may be instituted before the clerk of the superior court by any person claiming any money, or part thereof, paid into the clerk's office under G.S. 1-339.70 or G.S. 105-391, to determine who is entitled thereto.

(1967, c. 705, s. 2.)

Editor's Note.—The 1967 amendment inserted the reference to § 105-391 in subsection (a).

As the rest of the section was not changed by the amendment, only subsection (a) is set out.

ARTICLE 29C.

Validating Sections.

§ 1-339.72. Validation of certain sales. — All sales of real property under execution, deed of trust, mortgage or other contracts made since February 21, 1929, where notice of the original sale was published for four successive weeks, and notice of any resale was published for two successive weeks, shall be and the same are in all respects validated as to publication of notice. (1933, c. 96, s. 3; 1949, c. 719, s. 3; 1955, c. 1286; 1965, c. 786.)

Local Modification.—Nash: 1955, c. 1075.

Editor's Note. — The 1955 amendment inserted the first two references to notice. The 1965 amendment re-enacted this section without change.

§ 1-339.77. Validation of certain sales confirmed prior to time prescribed by law.—From and after June 1, 1953 no action shall be brought to contest the validity of a decree filed on or before December 31, 1950, confirming the sale of real or personal property in any special proceeding on the grounds that the decree of confirmation was entered prior to the expiration of the period of time as required by law following the report of sale. (1953, c. 1089.)

ARTICLE 30.

Betterments.

§ 1-340. Petition by claimant; execution suspended; issues found.

An action under this section is not the same as an action for unjust enrichment. Beacon Homes, Inc. v. Holt, 266 N.C. 467, 146 S.E.2d 434 (1966).

This section creates no independent cause of action. It merely declares that the owner of land who recovers it has no just claim to anything but the land itself and a fair compensation for being kept out of possession, and if it has been enhanced in value by improvements made by another under the belief that he was the owner, the true owner ought not to take the increased value without some compensation to the other. Board of Com'rs v. Bumpass, 237 N. C. 143, 74 S. E. (2d) 436 (1953).

The right under this section is a defensive right. Beacon Homes, Inc. v. Holt, 266 N.C. 467, 146 S.E.2d 434 (1966).

It Accrues When Owner Seeks to Enforce Right to Possession. — The right under this section accrues when an owner of the land seeks and obtains the aid of the court to enforce his right to possession. Beacon Homes, Inc. v. Holt, 266 N.C. 467, 146 S.E.2d 434 (1966).

The claim accrues when the owner seeks and obtains the aid of the court to enforce his right of possession. The law awards to the owner the land and his rents and to the occupant the value of his improvements. Board of Com'rs v Bumpass, 237 N. C. 143, 74 S. E. (2d) 436 (1953).

Owner Must Have Obtained Judgment Entitling Him to Eject Occupant. — The wording of this section clearly limits its application to possessory actions or actions in which the final judgment may be enforced by execution in the nature of a writ of possession or writ of assistance. And the right to claim compensation does not arise until the owner of a superior title asserts his right of possession and obtains a judgment which entitles him to eject the occupant—though the last sentence of this section would seem to permit the defendant to assert his claim in his answer and have an issue directed thereto submitted to the jury on the trial of the main issue. Board of Com'rs v. Bumpass, 237 N. C. 143, 74 S. E. (2d) 436 (1953).

No Claim against Remaindermen Until Falling in of Life Estate.—Where remaindermen had a tax foreclosure set aside to the extent that the tax deed purported to convey the remainder, but the conveyance of the life estate by the tax foreclosure was not affected, persons in possession under the tax foreclosure were not entitled to file claim for betterments against the remainderman until the falling in of the life estate and the assertion of the right to immediate possession by the remainderman. Board of Com'rs v. Bumpass, 237 N. C. 143, 74 S. E. (2d) 436 (1953).

Claim Cannot Defeat Plaintiff's Title.— In accord with original. See Board of

Com'rs v. Bumpass, 237 N. C. 143, 74 S. E. (2d) 436 (1953).

What Claimant Must Show.—This section has been interpreted to impose on claimant the burden of establishing (1) that he made permanent improvements, (2) bona fide belief of good title when the improvements were made, and (3) reasonable grounds for such belief. Pamlico County v. Davis, 249 N. C. 648, 107 S. E. (2d) 306 (1959).

Evidence Sufficient to Show "Permanent Improvements."—Evidence that the land in question was farm land which had been abandoned and had become a piece of waste-land, and that claimant, by ditching, clearing, building roads and similar work, made it again susceptible of profitable cultivation, is sufficient to show "permanent improvements" within the purview of this section. Pamlico County v. Davis, 249 N. C. 648, 107 S. E. (2d) 306 (1959).

Color of Title.—

This section applies only where the improvement was constructed by one who was in possession of the land under color of title and who, in good faith and reasonably, believed he had good title to the land. Beacon Homes, Inc. v. Holt, 266 N.C. 467, 146 S.E.2d 434 (1966).

Same—Reasonable Belief.—

The basis upon which betterments may be claimed is the finding by the jury that the person in possession, or those under whom he claims, believed at the time of making the improvements and had reason to believe the title good under which he and they were holding the premises. Board of Com'rs v. Bumpass, 237 N. C. 143, 74 S. E. (2d) 436 (1953).

Where the grantee knows that his grantor has only a life estate in the lands and nevertheless accepts a deed in form sufficient to convey fee simple title, and makes improvements upon the land, he may not recover for such betterments as against a remainderman, since they were not made under the belief that his color of title to the interest of the remainderman was good. Lovett v. Stone, 239 N. C. 206, 79 S. E. (2d) 479 (1954).

Separate Claim Should Be Filed by Each Group of Interveners. — This article requires that a claim for betterments be filed in the action in which judgment for land has been rendered. Proper pleading would require each group of interveners to file a separate and distinct claim uncomplicated by reference to the claim of the other. Board of Com'rs v. Bumpass, 237 N. C. 143, 74 S. E. (2d) 436 (1953).

Writ of Ouster Should Not Issue Until Judgment for Betterments Is Satisfied.— The plaintiff who establishes a superior title is entitled to judgment for the land, but no writ of ouster should issue until defendant's judgment for betterments is satisfied. Board of Com'rs v. Bumpass, 237 N. C. 143, 74 S. E. (2d) 436 (1953).

§ 1-341. Annual value of land and waste charged against defendant.

Erroneous Instruction. — Under this section, it is error for the court to give a charge which fails to instruct the jury that in making the assessment the use of the improvements made on the premises by the defendant should be excluded Edwards v. Edwards, 235 N. C. 93, 68 S. E. (2d) 822 (1952).

§ 1-344. Verdict, judgment, and lien.

Cited in Edwards v. Edwards, 235 N. C. 93, 68 S. E. (2d) 822 (1952).

§ 1-346. Value of premises without improvements.

The sole question is: How much was the value of the property permanently enhanced, estimated as of the time of the recovery of the same, by the betterments put thereon by the labor and expenditure of the bona fide holder of the same? Board of Com'rs v. Bumpass, 237 N. C. 143, 74 S. E. (2d) 436 (1953).

Article 31.

Supplemental Proceedings.

§ 1-352. Execution unsatisfied, debtor ordered to answer.

Editor's Note. — For note on supplemental proceedings or creditor's bill in North Carolina, see 35 N. C. Law Rev. 414.

Applied in Underwood v. Stafford, 270 N.C. 700, 155 S.E.2d 211 (1967).

Cited in Grabenhofer v. Garrett, 260 N. C. 118, 131 S. E. (2d) 675 (1963).

§ 1-353. Property withheld from execution; proceedings.

Applied in Richard Couture, Inc. v. Rowe, 263 N.C. 234, 139 S.E.2d 241 (1964).

§ 1-360. Debtors of judgment debtor, summoned.

Procedure.—

In accord with 1st paragraph in original. See Cornelius v Albertson, 244 N C 265, 93 S. E. (2d) 147 (1956).

When this section and G. S. 1-362 are read singly, or as an integral part of Article 31, Supplemental Proceedings, Chapter 1, Civil Procedure, of the General Statutes, it is manifest that a supplemental proceeding against a third person is designed to reach and apply to the satisfaction of the judgment property of the judgment debtor in the hands of the third person at the time of the issuance and service of the order for the examination of the third person, which could not be reached by an execution at law Cornelius v. Albertson, 244 N. C. 265, 93 S. E. (2d) 147 (1956).

Applied in Marx v. Maddrey, 106 F. Supp 535 (1952)

Cited in Grabenhofer v. Garrett, 260 N. C. 118, 131 S. E. (2d) 675 (1963).

§ 1-362. Debtor's property ordered sold.

Cross Reference.—See note to § 1-360.

Quoted in Cornelius v. Albertson, 244 N C. 265, 93 S. E. (2d) 147 (1956).

SUBCHAPTER XI. HOMESTEAD AND EXEMPTIONS.

ARTICLE 32.

Property Exempt from Execution.

§ 1-370. Conveyed homestead not exempt.

History of Section. — See Stokes v. Smith, 246 N. C. 694, 100 S. E. (2d) 85 (1957).

Intention of Legislature.—See Stokes v. Smith, 246 N. C. 694, 100 S. E. (2d) 85 (1957).

If one is to read this section intelligently, he should read first § 1-371, then § 1-375, and then this section. Stokes v. Smith, 246 N. C. 694, 100 S. E. (2d) 85 (1957).

§ 1-371. Sheriff to summon and swear appraisers. — Before levying upon the real estate of any resident of this State who is entitled to a homestead under this article, and the Constitution of this State, the sheriff [or a deputy sheriff designated by the sheriff, and who shall be twenty-one years of age or over], or other officer charged with the levy shall summon three discreet persons qualified to act as jurors, to whom he shall administer the following oath: "I, A. B., do solemnly swear (or affirm) that I have no interest in the homestead exemption of C. D., and that I will faithfully perform the duties of appraiser (or assessor, as the case may be), in valuing and laying off the same. So help me, God." In cases where he deems it necessary he may summon the county surveyor or some other competent surveyor to assist in laying off the homestead by metes and bounds. The portions of this section in brackets shall apply to the following counties only: Alamance, Ashe, Bertie, Brunswick, Buncombe, Cabarrus, Caldwell, Camden, Caswell, Chatham, Chowan, Cumberland, Currituck, Davidson, Davie, Duplin, Durham, Edgecombe, Forsyth, Gates, Graham, Guilford, Halifax, Harnett, Henderson, Hertford, Iredell, Jackson, Johnston, Lenoir, Lincoln, Martin, Mecklenburg, Moore, New Hanover, Onslow, Pasquotank, Perquimans, Pitt, Randolph, Rockingham, Rowan, Sampson, Scotland, Vance, Wayne, Wilson. (1868-9, c. 137, s. 2; Code, s. 502; 1893, c. 58; Rev., s. 687; C. S., s. 730; 1931, c. 58; 1933, cc. 37, 147; 1955, c. 20; 1967, c. 202.)

Editor's Note.—

The 1955 amendment inserted "Chatham" in the list of counties.

The 1967 amendment inserted "Caswell" in the list of counties.

Intention of Legislature. — See Stokes

v. Smith, 246 N. C. 694, 100 S. E. (2d) 85 (1957).

Duty of Officer Mandatory.—This section, by express language, commands the sheriff to lay off a homestead to the judgment debtor before any levy is made. The provisions of the statute are mandatory. Stokes v. Smith, 246 N. C. 694, 100 S. E. (2d) 85 (1957).

Sale under Execution Void for Noncompliance.—Sales made under execution merely for the purpose of providing funds to pay a debt are, when the homestead of the judgment debtor has not been allotted, void. Stokes v. Smith, 246 N. C. 694, 100 S. E. (2d) 85 (1957).

§ 1-372. Duty of appraisers; proceedings on return.

Cited in Stokes v. Smith, 246 N. C. 694, 100 S. E. (2d) 85 (1957).

§ 1-375. Levy on excess; return of officer.

Cited in Stokes v. Smith, 246 N. C. 694, 100 S. E. (2d) 85 (1957).

§ 1-376. When appraisers select homestead.

Cited in Stokes v. Smith, 246 N. C. 694, 100 S. E. (2d) 85 (1957).

§ 1-379. Appraiser's oath and fees.

Cited in Stokes v. Smith, 246 N. C. 694, 100 S. E. (2d) 85 (1957).

§ 1-386. Allotted on petition of owner.

Cited in Stokes v. Smith, 246 N. C. 694, 100 S. E. (2d) 85 (1957).

§ 1-389. Allotted to widow or minor children on death of homesteader.

Cited in Elledge v. Welch, 238 N. C. 61, 76 S. E. (2d) 340 (1953).

SUBCHAPTER XII. SPECIAL PROCEEDINGS.

Article 33.

Special Proceedings.

§ 1-393. Chapter applicable to special proceedings.

A condemnation proceeding is a special proceeding and hence, "except as otherwise provided," the rules respecting procedural notice and the other provisions of the chapter on civil procedure are applicable to a condemnation proceeding. Collins v. North Carolina State Highway, etc., Comm., 237 N. C. 277, 74 S. E. (2d) 709 (1953). See § 40-11.

§ 1-394. Contested special proceedings; commencement; summons.

—Special proceedings against adverse parties shall be commenced as is prescribed for civil actions. The summons shall command the officer to summons the defendant or defendants to appear and answer the complaint, or petition, of the plaintiff within ten days after its service upon the defendant or defendants, and must contain a notice stating in substance that if the defendant or defendants fail to answer the complaint, or petition, within the time specified, plaintiff will apply to the court for the relief demanded in the complaint, or petition. The summons must run in the name of the State, be signed by the clerk of the superior court having jurisdiction in the special proceeding, and be directed to the sheriff or other proper officers of the county, or counties, in which the defendant, or defendants, or any of them reside or may be found, and must be returnable before the clerk. The clerk shall indicate on the summons by appropriate words

that the summons is issued in a special proceeding and not in a civil action. The manner of service, whether by the sheriff or by publication, shall be as is prescribed for summons in civil actions by § 1-89: Provided, where the defendant is an agency of the federal government, or an agency of the State, or a local government, or an agency of a local government, the time for filing answer or other plea shall be within thirty (30) days after the date of service of summons or after the final determination of any motion required to be made prior to the filing of an answer. (1868-9, c. 93, s. 4; Code, ss. 279, 287; Rev., ss. 711, 712; C. S., s. 753; 1927, c. 66, s. 5; 1929, c. 50; 1929, c. 237, s. 3; 1939, c. 49, s. 2; 1939, c. 143; 1951, c. 783; 1961, c. 363.)

Editor's Note.—
The 1961 amendment, effective Jan. 1, 1962, deleted the former first proviso.

Cited in Burlington City Board of Education v. Allen, 243 N. C. 520, 91 S. E. (2d) 180 (1956).

§ 1-399. Defenses pleaded; transferred to civil issue docket; amendments.

Boundary Disputes.—
Where a special proceeding is begun to fix the location of the dividing line between two tracts of land, and defendant, by his answer, puts title to the disputed area in issue by alleging ownership, the proceeding in effect becomes an action to quiet title as provided by § 41-10. When the question of title is raised, the clerk should transfer the proceeding to the superior court in term. Bumgarner v. Corpening, 246 N. C. 40, 97 S. E. (2d) 427 (1957).

Where, in a special proceeding under § 38-1 to establish a boundary line, the defendant by his answer denies the petitioner's title and, as a defense, pleads seven years' adverse possession under color of title under § 1-38, or twenty years' adverse possession under § 1-40, the proceeding is assimilated to an action to quiet title. In such case, as provided by this section, the clerk "shall transfer the cause to the civil issue docket for trial during term upon all issues raised by the pleadings." Lane v. Lane, 255 N. C. 444, 121 S. E. (2d) 893 (1961).

Ejectment.—
In accord with original. See Murphy v. Smith, 235 N. C. 455, 70 S. E. (2d) 697 (1952).

Judicial Admission Removing Defense from Field of Issuable Matters.—Where defendants' answer to a petition for partition claimed sole seizin by virtue of an alleged contract under which the ancestor agreed upon a valid consideration to convey or devise the land to defendants, but upon the hearing, defendants admitted that they had no writing to support the alleged agreement to convey or devise, but stated they intended suing for breach of the agreement, the judicial admission effectively removed the defense from the field of issuable matters, since the alleged agreement was void under the statute of frauds, and it was not required that the clerk transfer the issue to the civil docket. Clapp v. Clapp, 241 N. C. 281, 85 S. E. (2d) 153 (1954).

Cited in Dellinger v. Bollinger, 242 N. C. 696, 89 S. E. (2d) 592 (1955).

§ 1-400. Ex parte; commenced by petition.

Petition Need Not Be Verified. — It is not necessary for a petition in an ex parte proceeding to be verified. Gillikin v. Gillikin, 252 N. C. 1, 113 S. E. (2d) 38 (1960).

§ 1-401. Clerk acts summarily; signing by petitioners; authorization to attorney.—In cases under § 1-400 if all persons to be affected by the decree or their attorney have signed the petition and are of full age, the clerk of the superior court has power to hear and decide the petition summarily. All of the petitioners must sign the petition, or must sign written application to clerk of court to be made petitioners and file same with the clerk or must sign a written authorization to the attorney which authorization must be filed with the clerk before he may make any order or decree to prejudice their rights. (1868-9, c. 93, s. 2; Code, s. 285; Rev., s. 719; C. S., s. 760; 1953, c. 246.)

Editor's Note. — The 1953 amendment, effective July 1, 1953, rewrote the second sentence which formerly related to filing of written authority from nonresident to attorney.

§ 1-402. Judge approves when petitioner is infant.

Irregularities Render Judgment Voidable But Not Void.—A judgment rendered in an ex parte proceeding approving the compromise and settlement of claims for personal injuries suffered by an infant is not void but only voidable, regardless of how irregular the proceedings may have been. It is binding until set aside by motion in the cause and is not subject to collateral attack. Gillikin v. Gillikin, 252 N. C. 1, 113 S. E. (2d) 38 (1960).

§ 1-404. Reports of commissioners and jurors.

The provisions of this section are not applicable to a condemnation proceeding, because the statutes bearing directly upon such proceeding prescribe different periods of time for the performance of the several acts enumerated. Collins v. North Carolina State Highway, etc., Comm., 237 N. C. 277, 74 S. E. (2d) 709 (1953).

§ 1-407. Commissioner holding proceeds of land sold for reinvestment to give bond.—Whenever in any cause or special proceeding there is a sale of real estate for the purpose of a reinvestment of the money arising from such sale, and the proceeds of such sale are held by a commissioner or other officer designated by the court to receive such money, for purposes of reinvestment, the commissioner or officer so receiving same shall execute a good and sufficient bond, to be approved by the court, in an amount at least equal to the corpus of the fund, and payable to the State of North Carolina for the protection of the fund and the parties interested therein, and conditioned that such custodian of the money shall faithfully comply with all the orders of the court made or to be thereafter made concerning the handling and reinvestment of said funds and for the faithful and final accounting of the same to the parties interested. (1919, c. 259; C. S., s. 766; 1935, c. 45; 1957, c. 80.)

Editor's Note.—

The 1957 amendment deleted the words "or for any other purpose" formerly appearing after "sale" in line three. It also omitted the provisions now constituting G. S. 1-407.2.

Applicability of Section to Trustees. — Where the court decrees a sale of trust property for reinvestment, the trustee should be required to give bond, or other legal provision should be made, to assure the safety of the funds arising from the sale, notwithstanding that the will provides that the trustee should not be required to give bond in administering the trust, since in acting under the decree of the court the trustees act as commissioners of the court and not necessarily as trustees under the will. Blades v. Spitzer, 252 N. C. 207, 113 S. E. (2d) 315 (1960).

Applied in Wachovia Bank & Trust Co. v. Johnston, 269 N.C. 701, 153 S.E.2d 449 (1967).

§ 1-407.1. Bond required to protect interest of infant or incompetent.—In the case of any sale of real estate, the court may, in its discretion, require a good and sufficient bond to protect the interests of any infant or incompetent. (1957, c. 80.)

§ 1-407.2. When court may waive bond; premium paid from fund protected.—The court, in its discretion, may waive the requirement of such bond in those cases in which the court requires the funds or proceeds from such sale to be paid by the purchaser or purchasers directly to the court. The premium for any such bond shall be paid from the corpus of the fund intended to be thereby protected. (1957, c. 80.)

§ 1-408. Action in which clerk may allow fees of commissioners; fees taxed as costs.

This section sets out the proper procedure for determination of fees to be allowed court-appointed commissioners. Beaker County Sand & Gravel Co. v. Taylor, 269 N.C. 617, 153 S.E.2d 19 (1967).

Section 28-170 Does Not Divest Clerk of Powers under This Section. — Section 28-170 does not divest the clerk of the superior court of the powers and duties expressly committed to him by the provisions of this section with respect to the fees of commissioners appointed for the sale of

land as provided therein. Welch v. Kearns, 259 N. C. 367, 130 S. E. (2d) 634 (1963).

Commissioner Entitled to Review of Order Fixing Compensation.—Since the commissioner is an agent of the court and accountable to it for his actions in connection with the discharge of his duties as commissioner, and entitled to have his compensation fixed as provided by law and taxed as a part of the costs of the proceeding, he is entitled to have an order reviewed which in his opinion has fixed his compensation at less than he in good faith believes his services to be worth. Welch v. Kearns, 259 N. C. 367, 130 S. E. (2d) 634 (1963).

But He Cannot Interfere in Litigation.—A special commissioner in a chancery cause, or a receiver of the court, is simply an officer of the court, and as such he has no right to intermeddle in questions affecting the rights of the parties, or the disposition of the property in his hands. He cannot interfere in the litigation or ask for the revision of any order or decree affecting the rights of the parties; but when his own accounts or his personal rights are affected, he has the same means of redress that any other party so affected would have. Becker County Sand & Gravel Co. v. Taylor, 269 N.C. 617, 153 S.E.2d 19 (1967).

Applied in Welch v. Kearns, 261 N.C. 171, 134 S.E.2d 155 (1964).

§ 1-408.1. Clerk may order surveys in civil actions and special proceedings involving sale of land.—In all civil actions and special proceedings instituted in the superior court before the clerk where real property is to be sold to make assets to pay debts, or to be sold for division, or to be partitioned, the clerk may, if, in his opinion, all parties to the action or proceedings will benefit thereby, order a survey of the land involved, appoint a surveyor for this purpose, and fix a reasonable fee for his services, which fee, along with other costs of the survey, shall be taxed as a part of the costs in such action or proceedings. Any dissatisfied party shall have the right of appeal to the judge, who shall hear the same de novo. (1955, c. 373.)

Definition of Boundaries in Judicial Sale of Land. — The court-appointed commissioner to conduct a judicial sale is empowered only to sell the land and distribute the proceeds, and has only such powers as may be necessary to execute the decree of the court, and therefore is not under duty to show the boundaries of the land or the means of ingress and egress to the property, the remedy of a prospective purchaser if he wishes a survey being by motion under this section. Walton v. Cagle, 269 N.C. 177, 152 S.E.2d 312 (1967).

SUBCHAPTER XIII. PROVISIONAL REMEDIES.

ARTICLE 34.

Arrest and Bail.

§ 1-409. Arrest only as herein prescribed.

Cited in Brannon v. Wood, 239 N. C. 112, 79 S. E. (2d) 256 (1953); Reverie Lingerie, Inc. v. McCain, 258 N. C. 353, 128 S. E. (2d) 835 (1963).

§ 1-410. In what cases arrest allowed. — The defendant may be arrested, as hereinafter prescribed, in the following cases:

(1) In an action for the recovery of damages on a cause of action not arising out of contract where the action is for wilful, wanton, or malicious injury to person or character or for wilfully, wantonly or maliciously injuring, taking, detaining, or converting real or personal property.

(2) In an action for a fine or penalty, for seduction, for money received, for property embezzled or fraudulently misapplied by a public officer, attorney, solicitor, or officer or agent of a corporation or banking association in the course of his employment, or by any factor, agent, broker or other person in a fiduciary capacity, or for any misconduct or neglect in office, or in a professional employment.

(3) In an action to recover the possession of personal property, unjustly detained, where all or any part of the property has been concealed, removed, or disposed of, so that it cannot be found or taken by the sheriff and with the intent that it should not be so found or taken, or with the intent to deprive the plaintiff of the benefit thereof.

(4) When the defendant has been guilty of a fraud in contracting the debt or incurring the obligation for which the action is brought, in concealing or disposing of the property for the taking, detention or conversion of which the action is brought, or when the action is brought to recover damages for fraud or deceit.

(5) When the defendant has removed, or disposed of his property, or is about to do so, with intent to defraud his creditors. The term "creditors" shall include, but not by way of limitation, a dependent spouse who claims alimony. The term "creditors" shall include, but not by way of limitation, a minor child entitled to an order for support. (1777, c. 118, s. 6, P. R.; R. C., c. 31, s. 54; C. C. P., s. 149; 1869-70, c. 79; Code, s. 291; 1891, c. 541; Rev., s. 727; C. S., s. 768; 1943, c. 543; 1961, c. 82; 1967, c. 1152, s. 6; c. 1153, s. 4.)

Editor's Note.—The 1961 amendment, effective Oct. 1, 1961, deleted from the end of this section the following: "No woman shall be arrested in any action except for a willful injury to person, character or property, and no person shall be arrested on Sunday."

The first 1967 amendment, effective Oct. 1, 1967, added the second sentence in subdivision (5).

The second 1967 amendment, effective Oct. 1, 1967, added the last sentence in subdivision (5).

Effect on Right to Execution against Person. — An essential prerequisite to plaintiff's right to body execution is that, where there has not already been a lawful arrest under this section, the complaint or affidavit must allege such facts as would have justified an order for such arrest. Nunn v. Smith, 270 N.C. 374, 154 S.E.2d 497 (1967).

Execution against Person for Cause Specified in Subdivision (1).—If a judgment is rendered against a defendant for a cause of action specified in subdivision (1) of this section, § 1-311 authorizes an execution against the person of the judgment debtor after the return of an execution against his property wholly or partly unsatisfied. Allred v. Graves, 261 N.C. 31, 134 S.E.2d 186 (1964).

Privilege against Self-Incrimination Inapplicable Where Remedy under This Section Relinquished.—In an action for malicious assault, if plaintiff seeks merely compensatory damages, and relinquishes all claim to punish defendants by punitive damages and to arrest them by virtue of subdivision (1) of this section and to issue an execution against their persons by virtue of the provisions of § 1-311, defendants' claim of privilege against self-incrimination does not apply. Allred v. Graves. 261 N.C. 31, 134 S.E.2d 186 (1964).

Discharge of Insolvent Debtor.—The provisions of § 23-29 (2) are broad and strong, and plainly extend to and embrace every person who may be arrested by virtue of an order of arrest issued pursuant to the provisions of this section, and also extend to and embrace every person who has been seized by virtue of an execution against his person by authority of the provisions of § 1-311. Allred v. Graves, 261 N.C. 31, 134 S.E.2d 186 (1964).

Punitive Damages.—For acts under subdivision (1) of this section, when a cause of action is properly alleged and proved and at least nominal damages are recovered by the plaintiff, a jury in its discretion can award punitive damages. Allred v. Graves, 261 N.C. 31, 134 S.E.2d 186 (1964).

Applied, as to subdivision (1), in Edwards v. Jenkins, 247 N. C. 565, 101 S. E. (2d) 410 (1958).

§ 1-412. Undertaking before order.

Cited in Edwards v. Jenkins, 247 N. C. 565, 101 S. E. (2d) 410 (1958).

§ 1-417. Motion to vacate order; jury trial.

Procuring Reduction of Bail Held to Constitute General Appearance.—When a consent order authorizing the reduction of bail, as authorized in this section, was

signed, defendants invoked the power of the court in their behalf and for their benefit, which constituted a general appearance and waived any defect in connection with the service of process. Reverie Lingerie, Inc. v. McCain, 258 N. C. 353, 128 S. E. (2d) 835 (1963).

§ 1-419. How defendant discharged.

Applied in Fryar v. Gauldin, 259 N. C. 391, 130 S. E. (2d) 689 (1963).

§ 1-420. Defendant's undertaking.

Applied in Fryar v. Gauldin, 259 N. C. 391, 130 S. E. (2d) 689 (1963).

§ 1-436. Proceedings against bail by motion.

Applied in Fryar v. Gauldin, 259 N. C. 391, 130 S. E. (2d) 689 (1963).

ARTICLE 35.

Attachment.

Part 1. General Provisions.

§ 1-440.1. Nature of attachment.

Cited in Murphy v. Murphy, 261 N.C. 95, 134 S.E.2d 148 (1964).

§ 1-440.2. Actions in which attachment may be had.—Attachment may be had in any action the purpose of which, in whole or in part, or in the alternative, is to secure a judgment for money, or in any action for alimony or for maintenance and support, or an action for the support of a minor child, but not in any other action. (1947, c. 693, s. 1; 1967, c. 1152, s. 4; 1153, s. 3.)

Editor's Note.—

The first 1967 amendment, effective Oct. 1, 1967, eliminated "by a wife" preceding "for alimony."

The second 1967 amendment, effective Oct. 1, 1967, inserted "or an action for the support of a minor child."

§ 1-440.3. Grounds for attachment.

Service of Process.—A resident of the State who has departed with intent to defraud his creditors or to avoid service of process, or a resident who keeps himself concealed in the State with like intent, is amenable to service of process by publication under § 1-98.2 (6). Harrison v. Hanvey, 265 N.C. 243, 143 S.E.2d 593 (1965).

Applied in Tyndall v. Tyndall, 270 N.C. 106, 153 S.E.2d 819 (1967).

Cited in Harrison v. Hanvey, 265 N.C. 243, 143 S.E.2d 593 (1965).

§ 1-440.7. Time within which service of summons or service by publication may be had.

Failure to Commence Service by Publication within Thirty-One Days.—A defendant is entitled to have an attachment dissolved if plaintiff fails to commence service by publication within thirty-one days after the issuance of the order of attachment. Accident Indem. Ins. Co. v. Johnson, 261 N.C. 778, 136 S.E.2d 95 (1964).

Extension of Time.—

The court has a right to extend the time for service by publication. Thrush v. Thrush, 246 N. C. 114, 97 S. E. (2d) 472 (1957).

Cited in Bright v. Williams, 245 N. C. 648, 97 S. E. (2d) 247 (1957).

Part 2. Procedure to Secure Attachment.

§ 1-440.10. Bond for attachment.

Cross Reference.—

See note to § 1-440.12.

When Defendant May Proceed on Bond.—See note to § 1-440.45.

§ 1-440.11. Affidavit for attachment; amendment.

I. IN GENERAL.

Cross Reference.—See note to § 1-440.12.

III. AMENDMENT.

Court Can Allow Amendment.—The court has discretionary power to permit a plaintiff to amend a defective affidavit upon which warrant of attachment was issued. Thrush v Thrush, 246 N. C. 114, 97 S. E. (2d) 472 (1957).

§ 1-440.12. Order of attachment; form and contents.

A clerk's ex parte order of attachment was properly issued under this section if plaintiff's verified complaint and bond for attachment met the requirements of § 1-440.11 and § 1-440.10 respectively. Armstrong v. Aetna Ins. Co., 249 N. C. 352, 106 S. E. (2d) 515 (1959).

§ 1-440.14. Notice of issuance of order of attachment when no personal service.

Late Filing of Newspaper's Affidavit.—After the court acquires control of a debt by the garnishment order, objections that the affidavit of the newspaper showing the publication of the notice and the sheriff's endorsement and return showing the levy in the garnishment proceeding were not timely filed as the law required, are not sufficient to justify a motion to dismiss. Ward v. Kolman Mfg. Co., 267 N.C. 131, 148 S.E.2d 27 (1966).

Part 3. Execution of Order of Attachment; Garnishment.

§ 1-440.16. Sheriff's return.

Late Filing of Return.—After the court acquires control of a debt by the garnishment order, objections that the affidavit of the newspaper showing the publication of the notice and the sheriff's endorsement and return showing the levy in the garnishment proceeding were not timely filed as the law required, are not sufficient to justify a motion to dismiss. Ward v. Kolman Mfg. Co., 267 N.C. 131, 148 S.E.2d 27 (1966).

§ 1-440.21. Nature of garnishment.

Proper Remedy to Reach Intangibles.—Garnishment is a proper ancillary remedy by which to discover intangible property rights and subject them to attachment. Ward v. Kolman Mfg. Co., 267 N.C. 131, 148 S.E.2d 27 (1966).

Prerequisites for Jurisdiction over Debt.—In order to subject a debt to garnishment and to give the court jurisdiction to act with respect thereto, three things should occur: (a) The corporation who is the garnishee must have such a residence and agency within the State as renders it amenable to the process of the court; (b) the principal defendant, who is the plaintiff's debtor, must himself have the right to sue the garnishee, his debtor, in this State for the recovery of the debt; (c) it must appear that the situs of the debt is in this State. Ward v. Kolman Mfg. Co., 267 N.C. 131, 148 S.E.2d 27 (1966).

Findings that the garnishee was a domesticated corporation, that it owed a debt, evidenced by a note, to a foreign corporation, that the note was assignable to the stockholders of the foreign corporation, that the foreign corporation owed a debt to plaintiff, that plaintiff, in his suit against the foreign corporation, duly garnished the debt and by amendment had the individual stockholders of the foreign corporation made parties, warrant the court in denying defendants' motion to dismiss for want of jurisdiction. Ward v. Kolman Mfg. Co., 267 N.C. 131, 148 S.E.2d 27 (1966).

Cross Action against Garnishee Not Permitted. — Defendant in an action on contract is not entitled to file a cross action on a separate contract against a party brought in by plaintiff solely for the purpose of garnishment. Kitchen Equip. Co. of Va., Inc. v. International Erectors, Inc., 268 N.C. 127, 150 S.E.2d 29 (1966).

Part 5. Miscellaneous Procedure Pending Final Judgment.

§ 1-440.36. Dissolution of the order of attachment.

Applied in Armstrong v. Aetna Ins. Co., 249 N. C. 352, 106 S. E. (2d) 515 (1959). Cited in Hill v. Dawson, 248 N. C. 95, 102 S. E. (2d) 396 (1958); Godwin v. Vinson, 254 N. C. 582, 119 S. E. (2d) 616 (1961).

§ 1-440.39. Discharge of attachment upon giving bond.

Effect of Undertaking as Waiver or Estoppel.—The filing of bond by a defendant to release his property from an attachment does not bar defendant from challenging the validity of the attachment. Armstrong v. Aetna Ins. Co., 249 N. C. 352, 106 S. E. (2d) 515 (1959).

Cited in Godwin v. Vinson, 254 N. C. 582, 119 S. E. (2d) 616 (1961).

Part 6. Procedure after Judgment.

§ 1-440.45. When defendant prevails in principal action.

When Defendant May Proceed on Bond.—If an order of attachment is dissolved, dismissed, or set aside by the court, or if the attachment plaintiff fails to obtain judgment against the attachment defendant, the attachment defendant may, without the necessity of showing malice or want of probable cause, proceed against the attachment plaintiff and his surety jointly or severally by independent action or motion in the cause, on the contractual obligations of the attachment plaintiff and his surety embodied in the bond and the statute under which it is given. Brown v. Guaranty Estates Corp., 239 N. C. 595, 80 S. E. (2d) 645 (1954); Godwin v. Vinson, 254 N. C. 582, 119 S. E. (2d) 616 (1961).

§ 1-440.46. When plaintiff prevails in principal action.

Cited in Hill v. Dawson, 248 N. C. 95, 102 S. E. (2d) 396 (1958).

ARTICLE 36.

Claim and Delivery.

§ 1-472. Claim for delivery of personal property.

Editor's Note. — For note as to availability of equitable replevin in North Carolina, see 33 N. C. Law Rev. 74-77.

Plaintiff May Recover Both Possession of Property and Damages for Its Detention.—In a proceeding for claim and delivery of personal property a plaintiff is entitled in a single action to recover both possession of the property and damages for its detention. Bowen v. King, 146 N. C. 385, 59 S. E. 1044 (1907); Mica Industries, Inc. v. Penland, 249 N. C. 602, 107 S. E. (2d) 120 (1959).

Action Will Lie against Officer Taking Property under Execution against Third Person. — An action for claim and delivery of personal property can be maintained by the owner against an officer taking the same under an execution against a third person. Jones v. Ward, 77 N. C. 337 (1877); Churchill v. Lee, 77 N. C. 341 (1877); Mitchell v. Sims, 124 N. C. 411, 32 S. E. 735 (1899); Mica Industries, Inc. v. Penland, 249 N. C. 602, 107 S. E. (2d) 120 (1959).

§ 1-473. Affidavit and requisites.

Action Will Lie Where Property Seized under Execution against Third Person.—See note to § 1-472.

Cited in Keith Tractor & Implement Co. v. McLamb, 252 N. C. 760, 114 S. E. (2d) 668 (1960); General Tire & Rubber Co. v. Distributors, Inc., 253 N. C. 459, 117 S. E. (2d) 479 (1960).

§ 1-475. Plaintiff's undertaking.

Cited in Universal C. I. T. Credit Corp. v. Saunders, 235 N. C. 369, 70 S. E. (2d) 176 (1952); Moore v. Humphrey, 247 N. C. 423, 101 S. E. (2d) 460 (1958); Tillis v. Calvine Cotton Mills, Inc., 251 N. C. 359, 111 S. E. (2d) 606 (1959).

§ 1-478. **Defendant's undertaking for replevy.**—At any time before the delivery of the property to the plaintiff, the defendant may, if he does not

except to the sureties of the plaintiff, require the return thereof, upon giving to the sheriff a written undertaking, payable to the plaintiff, executed by one or more sufficient sureties, to the effect that they are bound in double the value of the property, as stated in the affidavit of the plaintiff, for the delivery thereof to the plaintiff, with damages, not less than the difference in value of the property at the time of the execution of the undertaking and the value of the property at the time of its delivery to the plaintiff, together with damages for detention and the costs, if delivery can be had, and if delivery cannot be had, for the payment to him of such sum as may be recovered against the defendant for the value of the property at the time of the wrongful taking or detention, with interest thereon, as damages for such taking and detention, together with the costs of the action. If a return of the property is not so required, within three days after the taking and service of notice to the defendant, it must be delivered to the plaintiff, unless it is claimed by an interpleader.

The defendant's undertaking shall include liability for costs, as provided in this section, only where the undertaking is given in actions instituted in the superior court. (C. C. P., s. 181; Code, s. 326; 1885, c. 50, s. 2; Rev., s. 795; 1911 c. 17, C. S., s. 836; 1961, c. 462.)

Editor's Note. — The 1961 amendment deleted the words "for its deterioration and detention" formerly appearing after the words "damages" in line seven and substituted in lieu thereof the words "not less than the difference in value of the property at the time of the execution of the undertaking and the value of the property at the time of its delivery to the plaintiff, together with damages for detention."

Cited in Universal C. I. T Credit Corp. v Saunders 235 N C 369, 70 S E (2d) 176 (1952); General Tire & Rubber Co. v. Distributors, Inc., 251 N. C. 406, 111 S. E. (2d) 614 (1959).

§ 1-482. Property claimed by third person; proceedings.

Cross reference.—
For requisites of affidavit, see § 1-473.

ARTICLE 37.

Injunction.

§ 1-485. When temporary injunction issued.

I. GENERAL CONSIDERATION.

Discretion of Court.—It ordinarily lies in the sound discretion of the court to determine whether or not a temporary injunction will be granted on hearing pleadings and affidavits only In the exercise of such discretion the court should consider the inconvenience and damage to defendant as well as the benefit that will accrue to the plaintiff. Western Conference of Original Free Will Baptists of North Carolina v. Creech, 256 N. C. 128, 123 S. E. (2d) 619 (1962).

The constitutionality of a statute or ordinance should not be decided in an interlocutory injunction on pleadings and an ex parte affidavit, but should be determined at the hearing on the merits, when all the facts can be shown. Schloss v. Jamison, 258 N. C. 271, 128 S. E. (2d) 590 (1962).

Findings and Proceedings Are Not Binding at Trial on Merits.—The findings of fact and other proceedings of the judge who hears the application for an interlocutory injunction are not binding on the parties at the trial on the merits. Indeed, these findings and proceedings are not proper matters for the consideration of the court or jury in passing on the issues determinable at the final hearing. Schloss v. Jamison, 258 N. C. 271, 128 S. E. (2d) 590 (1962).

Appeal.—On appeal the Supreme Court is not bound by the findings or ruling of the court below in injunction cases, but may review the evidence on appeal. Even so, there is a presumption that the judgment entered below is correct, and the burden is upon appellant to assign and show error Western Conference of Original Free Will Baptists of North Carolina v. Creech, 256 N. C. 128, 123 S. E. (2d) 619 (1962).

Cited in Brown v. Williams, 242 N. C. 648, 89 S. E. (2d) 260 (1955).

II. NATURE.

The remedy authorized by this section is an ancillary one afforded by the courts of equity for the purpose of preserving the status quo pending the action. It will issue to prevent an injury being committed or seriously threatened. In addition, a mandatory injunction may be issued to restore the status wrongfully disturbed. Seaboard Air Line R. Co. v. Atlantic Coast Line R. Co., 237 N. C. 88, 74 S. E. (2d) 430 (1953).

Purpose Is to Maintain Status Quo.—It is the purpose of a temporary injunction to maintain as nearly as possible the status quo. Western Conference of Original Free Will Baptists of North Carolina v. Creech, 256 N. C. 128, 123 S. E. (2d) 619 (1962).

III. GROUNDS OF RELIEF.

A. Character of Relief in General.

The grant of a preliminary mandatory injunction is within the prerogative jurisdiction of courts of equity. Such preliminary injunctions are issued to preserve the status quo until upon final hearing the court may grant full relief, and are usually issued in cases where the defendant has proceeded knowingly in breach of contract or in willful disregard of an order of court. Seaboard Air Line R. Co. v. Atlantic Coast Line R. Co., 237 N. C. 88, 74 S. E. (2d) 430 (1953).

Mandatory Injunction May Be Issued for Protection of Easements and Proprietary Rights.—When it appears with reasonable certainty that the complainant is entitled to relief, the court will ordinarily issue the preliminary mandatory injunction for the protection of easements and proprietary rights. In such case it is not necessary to await the final hearing. If the asserted right is clear and its violation palpable, and the complainant has not slept on his rights, the writ will generally be issued without exclusive regard to the final determination of the merits, and the defendant compelled to undo what he has done. Seaboard Air Line R. Co. v. Atlantic Coast Line R. Co., 237 N. C. 88, 74 S. E. (2d) 430 (1953).

Mandatory Injunction Should Not Be Issued Except in Case of Apparent Necessity.—A preliminary mandatory injunction on ex parte application should not be granted, except in case of apparent necessity for the purpose of restoring the status quo pending the litigation. Seaboard Air Line R. Co. v. Atlantic Coast Line R. Co., 237 N. C. 88, 74 S. E. (2d) 430 (1953).

Injury Must Be Immediate, Pressing, Irreparable, and Clearly Established.—As a rule a mandatory order will not be made as a preliminary injunction, except where the injury is immediate, pressing, irreparable, and clearly established. Seaboard Air Line R. Co. v. Atlantic Coast Line R. Co., 237 N. C. 88, 74 S. E. (2d) 430 (1953).

Mandatory Injunction Held Improvidently Granted.—See Seaboard Air Line R. Co. v. Atlantic Coast Line R. Co., 237 N. C. 88, 74 S. E. (2d) 430 (1953).

C. Application of Section.

Injunction Subsidiary to Another Action or Special Proceeding.—A court of equity, or a court in the exercise of its equity powers, may use the writ of injunction as a remedy subsidiary to and in aid of another action or special proceeding. However, in such cases, in order to justify continuing the writ until the final hearing, ordinarily it must be made to appear (1) that there is probable cause the plaintiff will be able to establish the asserted right, and (2) that there is a reasonable apprehension of irreparable loss unless the temporary order of injunction remains in force, or that in the opinion of the court such injunctive relief appears to be reasonably necessary to protect the plaintiff's rights until the controversy can be determined. Edmonds v. Hall, 236 N. C. 153, 72 S. E. (2d) 221 (1952).

By subsidiary injunction proceedings a party to an action may be restrained from committing an act respecting the subject of the action which would render judgment therein ineffective. Edmonds v. Hall, 236 N. C. 153, 72 S. E. (2d) 221 (1952).

When Temporary Injunction Granted.—Ordinarily a temporary injunction will be granted pending trial on the merits, (1) if there is probable cause for supposing that plaintiff will be able to sustain his primary equity, and (2) if there is reasonable apprehension of irreparable loss unless injunctive relief be granted, or if in the court's opinion it appears reasonably necessary to protect plaintiff's right until the controversy between him and defendant can be determined. Western Conference of Original Free Will Baptists of North Carolina v. Creech 256 N. C. 128, 123 S. E. (2d) 619 (1962).

§ 1-486. When solvent defendant restrained.

Weighing Relative Conveniences and Inconveniences to Parties.—The hearing judge may issue an interlocutory injunction upon the application of the plaintiff

in actual or constructive possession to enjoin a trespass on land when the trespass would be continuous in nature and produce injury to the plaintiff during the litigation. But the rule that the judge will consider and weigh the relative conveniences and inconveniences to the parties in determining the propriety of the injunction is operative here. In consequence, an interlocutory injunction against a trespass should be refused where its issuance would confer little benefit on the plaintiff and cause great inconvenience to the defendant. Huskins v. Yancey Hospital, Inc., 238 N. C. 357, 78 S. E. (2d) 116 (1953).

Applied in Norman v. Williams, 241 N. C. 732, 86 S. E. (2d) 593 (1955).

§ 1-490. Not issued for longer than twenty days without notice.

Section Does Not Require Hearing within Twenty Days.—This section prescribes that a temporary restraining order issued without notice shall not be granted for a longer period than for twenty days, but it does not require a hearing within twenty days, and when a date fixed in the order for the hearing is within the twenty-day period the fact that the hearing is postponed by the judge for good and sufficient reason does not require the dissolution of the order. Owen v. Claude DeBruhl Agency, Inc., 241 N. C. 597, 86 S. E. (2d) 197 (1955).

§ 1-492. Order to show cause.

Injunction Based Solely upon Allegations of Complaint Held Improper. — Orders of injunction, entered on a hearing on notice to show cause under this section, are improper where the judge not only failed to find any facts on which to base the orders, but founded the orders solely upon the allegations of the complaint. Clinard v. Lambeth, 234 N. C. 410, 67 S. E. (2d) 452 (1951).

§ 1-493. What judges have jurisdiction.

Cited in Baker v. Varser, 239 N. C. 180, 79 S. E. (2d) 757 (1954).

§ 1-494. **Before what judge returnable.**—All restraining orders and injunctions granted by any of the judges of the superior court shall be made returnable before the resident judge of the district, a special judge residing in the district, or any superior court judge assigned to hold court in the district where the civil action or special proceeding is pending, within twenty (20) days from date of order. If a judge before whom the matter is returned fails, for any reason, to hear the motion and application, on the date set or within ten (10) days thereafter, any regular or special judge resident in, or assigned to hold the courts of, some adjoining district may hear and determine the said motion and application, after giving ten days' notice to the parties interested in the application or motion. This removal continues in force the motion and application theretofore granted till they can be heard and determined by the judge having jurisdiction. (1876, c. 223, s. 2; 1879, c. 63, ss. 2, 3; 1881, c. 51; Code, s. 336; Rev., s. 815; C. S., s. 852; 1963, c. 1143.)

Editor's Note.—The 1963 amendment rewrote this section so as to permit restraining orders and injunctions to be made returnable before special judges of the superior court.

§ 1-496. **Undertaking.**—Upon granting a restraining order or an order for an injunction, the judge shall require as a condition precedent to the issuing thereof that the clerk shall take from the plaintiff a written undertaking, with sufficient sureties, to be justified before, and approved by, the clerk or judge, in an amount to be fixed by the judge, to the effect that the plaintiff will pay to the party enjoined such damages, not exceeding an amount to be specified, as he sustains by reason of the injunction, if the court finally decides that the plaintiff was not entitled to it. Provided, however, that in suits between spouses, relating to support, alimony, custody of children, separation, divorce from bed and board, and divorce absolute no bond or undertaking shall be required of the plaintiff spouse as a condition precedent to the issuing of a restraining order enjoining the defendant spouse from interfering with, threatening, or in any way

molesting the plaintiff spouse during pendency of the suit, until further order of the court. (C. C. P., s. 192; Code, s. 341; Rev., s. 817; C. S., s. 854; 1965, c. 104.)

Editor's Note.—The 1965 amendment added the last sentence.

This section and § 1-497 are in pari materia and must be construed together. M. Blatt Co. v. Southwell, 259 N. C. 468, 130 S. E. (2d) 859 (1963).

Recovery under § 1-497.—There can be no recovery of damages under § 1-497, on a bond given in accordance with this section, unless and until the court finally decides that the plaintiff was not entitled to the restraining order or injunction. M. Blatt Co. v. Southwell, 259 N. C. 468, 130 S. E. (2d) 859 (1963).

§ 1-497. Damages on dissolution.

This section and § 1-496 are in pari materia and must be construed together. M. Blatt Co. v. Southwell, 259 N. C. 468, 130 S. E. (2d) 859 (1963).

Court Must Decide Party Was Not Entitled to Injunction.—There can be no recovery of damages under this section on a bond given in accordance with § 1-496, unless and until the court finally decides that the plaintiff was not entitled to the restraining order or injunction. M. Blatt Co. v. Southwell, 259 N. C. 468, 130 S. E. (2d) 859 (1963)

Or Render Order the Equivalent Thereof.—Absent an express decision that plaintiff was not entitled to the temporary restraining order, the question is whether the order rendered was the equivalent of such a decision. M. Blatt Co. v. Southwell, 259 N. C. 468, 130 S. E. (2d) 859 (1963).

Such as a Voluntary and Unconditional Dismissal by Plaintiff.—In an action in which the plaintiff has obtained a temporary restraining order or injunction by giving bond as required by § 1-496, the voluntary and unconditional dismissal of the proceedings by the plaintiff is equivalent to a judicial determination that the proceeding for an injunction was wrongful, since thereby the plaintiff is held to have confessed that he was not entitled to the equitable relief sought. M. Blatt Co. v. Southwell 259 N. C. 468, 130 S. E. (2d) 859 (1963).

Proof.—To sustain an action for damages, it must be made to appear that such injunction was wrongful in its inception, or at least was continued owing to some wrong on the part of plaintiff. M. Blatt Co. v. Southwell, 259 N. C. 468, 130 S. E. (2d) 859 (1963).

Burden.—The burden of proof was on defendant to show, as a prerequisite to his right to recover damages from plaintiff and its surety either that the court had finally decided plaintiff was not entitled to the temporary restraining order or that something had occurred equivalent to such a decision. M Blatt Co. v. Southwell, 259 N. C. 468, 130 S. E. (2d) 859 (1963).

Effect of Injunction Rightfully Awarded but Properly Dissolved.—If an injunction is rightfully awarded, but afterwards properly dissolved because of matters done or arising subsequent to its issuance, there can be no recovery of damages. M. Blatt Co. v. Southwell, 259 N. C. 468, 130 S. E. (2d) 859 (1963).

Hence, a judgment of voluntary dismissal by agreement of the parties of an action in which a restraining order has been issued is not an adjudication that the restraining order was improvidently or erroneously issued. M. Blatt Co. v. Southwell 259 N. C. 468, 130 S. E. (2d) 859 (1963).

Cited in Warner v. Gulf Oil Corp., 178 F. Supp. 481 (1959).

§ 1-498. Issued without notice; application to vacate.

Applied in New Bern v. Walker, 255 N. C. 355, 121 S. E. (2d) 544 (1961).

§ 1-500. Restraining orders and injunction in effect pending appeal; indemnifying bond.

Discretion of Court, etc.—

The dissolution of a restraining order is in the discretion of the trial judge. Such an order is not reviewable by the Supreme Court except in cases of abuse of discretion. Currin v. Smith, 270 N.C. 108, 153 S.E.2d 821 (1967).

Applied in Treasure City of Fayetteville, Inc. v. Clark, 261 N.C. 130, 134 S.E.2d 97 (1964); Clark's Charlotte, Inc. v. Hunter, 261 N.C. 222, 134 S.E.2d 364 (1964); Frosty Ice Cream, Inc. v. Hord, 263 N.C. 43, 138 S.E.2d 816 (1964); High Point Surplus Co. v. Pleasants, 263 N.C. 587, 139 S.E.2d 892 (1965); High Point Surplus Co. v. Pleasants, 264 N.C. 650, 142 S.E.2d 697 (1965).

Cited in G I Surplus Store, Inc. v. Hunter 257 N. C. 206, 125 S. E. (2d) 764 (1962).

Article 38.

Receivers.

Part 1. Receivers Generally.

§ 1-501. What judge appoints.

Cited in East Carolina Lumber Co. v. West, 247 N. C. 699, 102 S. E. (2d) 248 (1958); Dowd v. Charlotte Pipe & Foundry Co., 263 N.C. 101, 139 S.E.2d 10 (1964).

§ 1-502. In what cases appointed.

4. In cases provided in G. S. 1-507.1 and in like cases, of the property within this State of foreign corporations.

The provisions of G. S. 1-507.1 through 1-507.11 are applicable, as near as may be, to receivers appointed hereunder (C. C. P., s. 215, 1876-7, c. 223; 1879, c. 63; 1881, c. 51; Code, s. 379, Rev., s. 847; C. S., s. 860; 1955, c. 1371, s. 3.)

Editor's Note.—The 1955 amendment, effective July 1, 1957, rewrote paragraph 4 and the last unnumbered paragraph. Only the two rewritten paragraphs are set out.

Receivership is ordinarily ancillary to some equitable relief. Murphy v. Murphy, 261 N.C. 95, 134 S.E.2d 148 (1964).

Discretion, etc.—

A receiver may be appointed pendente lite in the discretion of the court. Murphy v. Murphy, 261 N.C. 95, 134 S.E.2d 148 (1964).

A receiver will not, etc.—

Receivership is a harsh remedy and will be granted only where there is no other safe or expedient remedy. Murphy v. Murphy, 261 N.C. 95, 134 S.E.2d 148 (1964).

Domestic Relations.—Receivers have been appointed in domestic relations cases to preserve specific property and to collect rents and income. Murphy v. Murphy, 261 N.C. 95, 134 S.E.2d 148 (1964).

Applied in Nat. Surety Corp. v. Sharpe, 236 N. C. 35, 72 S. E. (2d) 109 (1952).

Cited in York v. Cole, 251 N. C. 344, 111 S. E. (2d) 334 (1959).

§ 1-503. Appointment refused on bond being given.

Cited in York v. Cole, 251 N. C. 344, 111 S. E. (2d) 334 (1959).

§ 1-505. Sale of property in hands of receiver.—The resident judge or the judge assigned to hold any of the courts in any judicial district of North Carolina shall have power and authority to order a sale of any property, real or personal, in the hands of a receiver duly and regularly appointed by the superior court of North Carolina upon such terms as appear to be to the best interests of the creditors affected by said receivership. The procedure for such sales shall be as provided in article 29A of chapter 1 of the General Statutes. (1931, c. 123, s. 1; 1949, c. 719, s. 2; 1955, c. 399, s. 1.)

Editor's Note.—

The 1955 amendment eliminated from the beginning of the second sentence "Except as provided in G. S. § 1-506."

Sale of Property in Hands of Receiver Appointed to Enforce Payment of Alimony. — In a wife's action for alimony without divorce, a receiver appointed therein to take possession of the husband's property within the State may collect the income from the husband's realty for the purpose of paying alimony awarded the wife in the action and may sell the husband's real estate if necessary to pay the alimony decreed. Lambeth v. Lambeth, 249 N. C. 315, 106 S. E. (2d) 491 (1959).

A judge of the superior court has the power to order the sale of a defendant husband's non-income-producing real estate for the purpose of investing the proceeds in legal investments as provided in article 6 of chapter 53, so as to produce an income sufficient to enable a receiver appointed to enforce payment of alimony decreed to pay the expenses of the receivership and alimony awarded the plaintiff wife. Lambeth v. Lambeth, 249 N. C. 315, 106 S. E. (2d) 491 (1959).

§ 1-506: Repealed by Session Laws 1955, c. 399, s. 2.

Part 2. Receivers of Corporations.

§ 1-507.1. Appointment and removal.—When a corporation becomes insolvent or suspends its ordinary business for want of funds, or is in imminent danger of insolvency, or has forfeited its corporate right, or its corporate existence has expired by limitation, a receiver may be appointed by the court under the same regulations that are provided by law for the appointment of receivers in other cases; and the court may remove a receiver or trustee and appoint another in his place, or fill any vacancy. Everything required to be done by receivers or trustees is valid if performed by a majority of them. (Code, s. 668; 1901, c. 2, ss 73, 79; Rev., ss. 1219, 1223, C. S., s. 1208; 1955, c. 1371, s. 2.)

Editor's Note. – Session Laws 1955, c. 1371, s. 2, effective July 1, 1957, transferred former G S 55-147 through 55-157 to appear as this and the ten following sections.

For article on corporate receivership in North Carolina, see 32 N. C. Law Rev. 149.

Broad Powers Conferred.—This part is so broad and comprehensive in its provisions regarding the appointment of receivers that it is not necessary to refer to the general power of a court of equity in such cases. Summit Silk Co. v. Kinston Spinning Co., 154 N.C. 421, 70 S.E. 820 (1911).

Section Does Not Limit Power of Court.—The power of the court to appoint a receiver in proper cases is not limited by this section or § 1-502. Sinclair v. Moore Cent. R. R., 228 N.C. 389, 45 S.E.2d 555 (1947).

Nature of Receivership.—Upon the insolvency of a corporation and the appointment of a receiver under the provisions of this section, the receiver represents the creditors as well as the owners, excluding the general creditors from taking any separate or effective steps on their account in furtherance of their claims; and the proceeding for the receivership is in the nature of a judicial process by which the rights of the general creditors are fastened upon the property. Observer Co. v. Little, 175 N.C. 42 94 S.E. 526 (1917).

Discretion of Court.—The selection of a receiver for an insolvent corporation is a matter largely in the discretion of the trial judge, and will not generally be reviewed unless this discretionary power has been greatly abused; and though the practice of appointing the plaintiff's attorney as receiver is not commended, he will not be removed, as a matter of law, on appeal, though, like any other receiver, he may be removed upon application to the proper judge of the superior court. Mitchell v. Aulander Realty Co., 169 N.C. 516, 86 S.E. 358 (1915). See Fisher v. Southern Loan & Trust Co., 138 N.C. 90, 50 S.E. 592 (1905).

Effect of Appointment.—The appointment of a receiver, who is directed to take control of all the property of a company, and to assume entire management of its affairs, has the effect of suspending all the officers of the company; and they cannot interfere with the business of the company, and are entitled to no salaries during the continuance of the receivership. Lenoir v. Linville Improvement Co., 126 N.C. 922, 36 S.E. 185 (1900).

Title of Receiver Relates Back.—The title of the receiver on his appointment dates back to the time of granting the order, even though certain preliminary conditions must first be performed and the receiver remains out of possession pending such performance. Worth v. Bank of New Hanover, 122 N.C. 397, 29 S.E. 775 (1898); Pelletier v. Greenville Lumber Co., 123 N.C. 596, 31 S.E. 855 (1898); Battery Park Bank v. Western Carolina Bank, 127 N.C. 432, 37 S.E. 461 (1900); Fisher v. Western Carolina Bank, 132 N.C. 769, 44 S.E. 601 (1903).

Continuance of Receivership.—A receivership continues as long as the court may think it necessary to the performance of the duties pertaining thereto. Young v. Rollings, 90 N.C. 125 (1884).

Officers' Duty When Receiver Appointed.—An order appointing a receiver of a defunct corporation with power to receive into possession all the effects of the company, and with the usual rights and powers of receivers, involves the correlative duty of delivering the funds to him by the late officers of the company in whose hands the funds are, although this is not expressly required in the decretal order. Young v. Rollings, 90 N.C. 125 (1884).

Valid Liens Not Divested.—The title of a receiver relates only to the time of his appointment, and valid liens existing at that time are not divested. Battery Park Bank v. Western Carolina Bank, 127 N.C. 432, 37 S.E. 461 (1900); Roberts v. Bowen Mfg. Co., 169 N.C. 27, 85 S.E. 45 (1915).

Where Assignee Appointed Receiver.—One to whom an insolvent bank made an assignment of its assets, and who on the same day, and at the suit of creditors, was appointed receiver, held the assets after such adjudication, not by virtue of the deed of assignment, but as an officer of the court appointed to settle and wind up the affairs of such insolvent bank. Davis v. Industrial Mfg. Co., 114 N.C. 321, 19 S.E. 371 (1894).

Receiver Appointed after Reorganization.—The organization of a new corporation at once dissolves the old one, and if there are creditors of the dissolved corporation they may cause the property of the defunct corporation to be applied to their debts by means of a receiver. Marshall v. Western, N.C. R.R., 92 N.C. 322 (1885).

Dissolution of De Facto Corporation.—Assuming that a bank which had never been duly incorporated had a corporate existence as to those who bona fide dealt with it is as corporation, a receiver should be appointed to take charge of and preserve its effects, where it has voluntarily dissolved, and no one claims to own its stock, and all its supposed officers disclaim their offices. Dobson v. Simonton, 78 N.C. 63 (1878).

Fraudulent Disposal of Property.—If, during the existence of a corporation, its officers fraudulently or unlawfully disposed of any of its property, the creditors are entitled to have a receiver appointed to sue for and recover it. Latta v. Catawba Elec. Co., 146 N.C. 285, 59 S.E. 1028 (1907).

Cessation of Business.—Where a corporation had ceased operation, a stockholder had the right to maintain an action for the appointment of a receiver, although the corporation had not been dissolved in accordance with the provisions of the statute. Greenleaf v. Land & Lumber Co., 146 N.C. 505, 60 S.E. 424 (1908).

When Receiver Unnecessary.—It is unnecessary to have a receiver appointed in order for the assignee of a judgment creditor, and those beneficially interested, to maintain an action against officers and stockholders for misapplication of funds in distribution among the shareholders as dividends. Chatham v. Mecklenburg Realty Co., 180 N.C. 500, 105 S.E. 329 (1920).

Remedy Not Available in Federal Courts.—This section does not confer upon a stockholder or a creditor a substantive right, but merely gives a new remedy, and such remedy is not available in the federal courts. See & Depew v. Fisheries Prods. Co., 9 F.2d 235 (1925).

Adjudication of Bankruptcy during Insolvency Proceedings.—Proceedings against an insolvent corporation under this section do not preclude creditors from petitioning to have the corporation adjudged a bankrupt, notwithstanding the action of the State courts. In re McKinnon Co., 237 Fed. 869 (1916).

Statutes Applicable to Receiver Appointed under Code of Civil Procedure.—Under G. S. 1-502, the statutes embodied in this Part are "applicable, as near as may be," to a receiver appointed under the Code of Civil Procedure. National Surety Corp v. Sharpe, 236 N C. 35, 72 S. E. (2d) 109 (1952).

Order Made without Specific Findings of Fact or Request Therefor.—Where an order appointing receivers is made without specific findings of fact and without any request for findings, it will be presumed that the judge accepted as true for the purposes of the order the facts alleged in the complaint, used as an application for receivership. Royall v. Carr Lumber Co., 248 N. C. 735, 105 S. E. (2d) 65 (1958).

Cited in Savannah Sugar Refining Co. v. Royal Crown Bottling Co. of Wilmington, Inc., 259 N. C. 103, 130 S. E. (2d) 33 (1963).

§ 1-507.2. Powers and bond.—The receiver has power and authority to—

1. Demand, sue for, collect, receive and take into his possession all the goods and chattels, rights and credits, moneys and effects, lands and tenements, books, papers, choses in action, bills, notes, and property of every description of the corporation.

2. Foreclose mortgages, deeds of trust, and other liens executed to the corporation.

3. Institute suits for the recovery of any estate, property, damages, or demands existing in favor of the corporation, and he shall, upon application by him, be substituted as party plaintiff in the place of the corporation in any suit or proceeding pending at the time of his appointment.

4. Sell, convey, and assign all of the said estate, rights, and interest.

5. Appoint agents under him.

6. Examine persons and papers, and pass on claims as elsewhere provided in this part.

7. Do all other acts which might be done by the corporation, if in being, that are necessary for the final settlement of its unfinished business.

The powers of the receiver may be continued as long as the court thinks necessary, and the receiver shall hold and dispose of the proceeds of all sales of property under the direction of the court, and, before acting, must enter into such bond and comply with such terms as the court prescribes. (Code, s. 668; 1901, c. 2, ss. 74, 84; Rev., ss. 1222, 1231; C. S., s. 1209; 1955, c. 1371, s. 2.)

Appointment of Receiver Does Not Suspend Running of Limitations. — When a statute of limitations has begun to run, no subsequent disability will stop it, and ordinarily the mere appointment of a receiver will not toll the statute unless the circumstances are such that such appointment precludes the institution of suit. Thus, when a receiver has full authority to institute suit, as in the instant case, his appointment will not suspend the running of limitations under § 1-40. Nicholas v. Salisbury Hardware & Furniture Co., 248 N. C. 462, 103 S. E. (2d) 837 (1958).

Directors Superseded.—Appointment of receivers of a corporation on a creditors' bill supersedes the power of the directors to carry on the business of the corporation, and the receivers take possession of the corporation until further order of the court. See & Depew v. Fisheries Prods. Co., 9 F.2d 235 (1925).

Power of Receiver to Bring All Actions. —The receiver represents and, in a certain sense, succeeds to the rights of the corporation. There is no valid reason why he may not, representing the corporation and its creditors, bring any and all actions in respect to its assets, or rights of action, which it or its creditors could have brought. Smathers v. Western Carolina Bank, 135 N.C. 410, 47 S.E. 893 (1904).

All Rights May Be Adjusted.—In a suit by the receivers of a bank may be adjudicated all the rights of the bank, its creditors, and the defendant debtor, both legal and equitable, pertaining to the matters set out in the pleadings, and such judgment may be entered as will enforce the rights of the general creditors and also protect any equities that the defendant may be entitled to. Smathers v. Western Carolina Bank, 135 N.C. 410, 47 S.E. 893 (1904). See Gray v. Lewis, 94 N.C. 392 (1886); Davis v. Industrial Mfg. Co., 114 N.C. 321, 19 S.E. 371, 23 L.R.A. 322 (1894).

The receiver may sue either in his own name or that of the corporation. In whichever name he may elect to bring the action, it is essentially a suit by the corporation, prosecuted by order of the court, for the collection of the assets. Gray v. Lewis, 94 N.C. 392 (1886); Davis v. Industrial Mfg. Co., 114 N.C. 321, 19 S.E. 371, 23 L.R.A. 322 (1894); Smathers v. Western Carolina Bank, 135 N.C. 410, 47 S.E. 893 (1904).

Receiver May Plead Usury.—The plea of usury may be made by the receiver of an insolvent corporation against which a usurious contract is sought to be enforced. Riley v. Sears, 154 N.C. 509, 70 S.E. 997 (1911).

Valid Existing Liens Protected.—The title of a receiver of a private corporation to the corporate property relates back only to the time of his appointment, and it cannot divest the property of valid liens existing at that time. Roberts v. Bowen Mfg. Co., 169 N.C. 27, 85 S.E. 45 (1915).

Receiver Has No Extraterritorial Power. —A receiver, appointed in a stockholder's action to sequester assets of the corporation against mismanagement of its officers and directors, has no extraterritorial power. See & Depew v. Fisheries Prods. Co., 9 F.2d 235 (1925).

Priority between Receivers.—One receiver has no priority over another receiver previously appointed in another district on a creditors' bill. See & Depew v. Fisheries Prods. Co., 9 F.2d 235 (1925).

Power after Charter Has Expired.—A receiver, appointed under § 1-507.1 to wind up the affairs of a corporation, can proceed to collect the assets and to prosecute and defend suits, after the corporation has ceased to exist by the expiration of its charter. Asheville Div. v. Aston, 92 N.C. 579 (1885).

Effect of Judgment against Corporation. —Judgments against a corporation rendered upon process issued after it ceased to exist are of no validity; and the same may be impeached by a party interested in the administration of its assets. Dobson v. Simonton, 86 N.C. 492 (1882).

Conveyances.—While subdivision 4 empowers receivers to convey the estate, the receiver of a corporation may not ordinarily dispose of a substantial part of the

assets entrusted to him without authority of court, and sales are subject to confirmation unless authority to convey on specified terms is expressly given. Harrison v. Brown, 222 N.C. 610, 24 S.E.2d 470 (1943).

Deed Held Sufficient to Pass Title.—Where, under a court order, the receiver of an insolvent bank had conveyed lands according to the terms of a deed of trust by which the bank held the land, applying this and § 1-507.3 the deed was sufficient in law to pass title. Wachovia Bank & Trust Co. v. Hudson, 200 N.C. 688, 158 S.E. 244 (1931).

§ 1-507.3. Title and inventory.—All of the real and personal property of an insolvent corporation, wheresoever situated, and all its franchises, rights, privileges and effects, upon the appointment of a receiver, forthwith vest in him, and the corporation is divested of the title thereto. Within thirty days after his appointment he shall lay before the court a full and complete inventory of all estate, property, and effects of the corporation, its nature and probable value, and an account of all debts due from and to it, as nearly as the same can be ascertained, and shall make a report of his proceedings to the superior court at such times as the court may direct during the continuance of the trust. (1901, c. 2, ss. 75, 80; Rev., ss. 1224, 1225; C. S., s. 1210; 1945, c. 635; 1955, c. 1371, s. 2.)

Prior Liens Not Divested.—In the very nature of things, the receiver takes the property of the insolvent debtor subject to the mortgages, judgments, and other liens existing at the time of his appointment. This rule is recognized and enforced when the court permits a receiver to sell encumbered property free from liens, and transfers the liens to the proceeds of sale under G. S. 1-507.8. National Surety Corp. v. Sharpe, 236 N. C. 35, 72 S. E. (2d) 109 (1952).

The appointment of a receiver does not divest the property of prior existing liens, but the court, through its receiver, receives such property impressed with all existing rights and equities, and the relative ranks of claims and standing of liens remain unaffected by the receivership. Pelletier v. Greenville Lumber Co., 123 N.C. 596, 31 S.E. 855 (1898); Battery Park Bank v. Western Carolina Bank, 127 N.C. 432, 37 S.E. 461 (1900); Fisher v. Western Carolina Bank, 132 N.C. 769, 44 S.E. 601 (1903); Garrison v. Vermont Mills, 154 N.C. 1, 69 S.E. 743 (1910); Witherell v. Murphy, 154 N.C. 82, 69 S.E. 748 (1910).

Insurance Policies Not Forfeited.—The vesting of the property of a corporation in the receiver under this section does not constitute such a change in the "interest, title or possession" of the property as to forfeit insurance policies on the property. Southern Pants Co. v. Rochester German Ins. Co., 159 N.C. 78, 74 S.E. 812 (1912).

Effect of Subsequent Judgments.—The title to the property of a corporation vests in the receiver at the time he was duly appointed by the court, from which time the corporation is divested thereof, and a judgment against the corporation entered thereafter, but before the docketing of the order or the qualifying of the receiver thereunder, can acquire no lien in favor of the judgment creditor. Odell Hardware Co. v. Holt-Morgan Mills, 173 N.C. 308, 92 S.E. 8 (1917).

A judgment rendered against a corporation does not relate back, by implication of law, to the beginning of the term, so as to create a lien on the corporate property as against the vesting of the title in a receiver who had in the meanwhile been appointed. Odell Hardware Co. v. Holt-Morgan Mills, 173 N.C. 308, 92 S.E. 8 (1917).

Where a creditor held an unsecured claim against an insolvent partnership at the time of the appointment of the receiver, and subsequent to that event reduced such claim to judgment in an independent action against the partners, the creditor did not acquire any lien under the judgment on any of the property owned by the defendants as partners, because under this section such property vested in the receiver prior to the rendition of the judgment. National Surety Corp. v. Sharpe, 236 N. C. 35, 72 S. E. (2d) 109 (1952).

Effect of Unrecorded Conditional Sale Contract.—A receiver has the power of creditors armed with process to disregard or avoid the unrecorded condition in a contract of conditional sale. Observer Co. v. Little, 175 N.C. 42, 94 S.E. 526 (1917).

Where Receiver Refuses to Bring Action.—In an action brought by creditors, depositors or stockholders to recover assets belonging to the corporation, the title to which has vested in the receiver, upon his refusal to bring the action the receiver may properly be made a defendant, to the

end that the recovery may be subject to orders and decrees by the court, in the judgment as to its application to the claims of creditors and depositors, or to its distribution among stockholders. Douglass v. Dawson, 190 N.C. 458, 130 S.E. 195 (1925).

§ 1-507.4. Foreclosure by receivers and trustees of corporate mortgagees or grantees.—Where real estate has been conveyed by mortgage deed, or deed of trust to any corporation in this State authorized to accept such conveyance for the purpose of securing the notes or bonds of the grantor, and such corporation thereafter shall be placed in the hands of a receiver or trustee in properly instituted court proceedings, then such receiver or trustee under and pursuant to the orders and the decrees of the said court or other court of competent jurisdiction may sell such real property pursuant to the orders and the decrees of the said court or may foreclose and sell such real property as provided in such mortgage deed, or deed of trust, pursuant to the orders and decrees of such court.

All such sales shall be made as directed by the court in the cause in which said receiver is appointed or the said trustee elected, and for the satisfaction and settlement of such notes and bonds secured by such mortgage deed or deed of trust or in such other actions for the sales of the said real property as the said receiver or trustee may institute and all pursuant to the orders and decrees of the court having jurisdiction therein.

All sales of real property made prior to April 10, 1931 by such receiver or trustee of and pursuant to the orders of the courts of competent jurisdiction in such cases, are hereby validated. (1931, c. 265; 1955, c. 1371, s. 2.)

§ 1-507.5. May send for persons and papers; penalty for refusing to answer.—The receiver has power to send for persons and papers, to examine any persons, including the creditors, claimants, president, directors, and other officers and agents of the corporation, on oath or affirmation (which oath or affirmation the receiver may administer), respecting its affairs and transactions and its estate, money, goods, chattels, credits, notes, bills, choses in action, real and personal estate and effects of every kind; and also respecting its debts, obligations, contracts, and liabilities, and the claims against it; and if any person refuses to be sworn or affirmed, or to make answers to such questions as may be put to him, or refuses to declare the whole truth touching the subject matter of the examination, the court may, on report of the receiver, commit such person as for contempt. (1901, c. 2, s. 78; Rev., s. 1227; C. S., s. 1211; 1955, c. 1371, s. 2.)

§ 1-507.6. Proof of claims; time limit.—All claims against an insolvent corporation must be presented to the receiver in writing; and the claimant, if required, shall submit himself to such examination in relation to the claim as the receiver directs, and shall produce such books and papers relating to the claim as shall be required. The receiver has power to examine under oath or affirmation all witnesses produced before him touching the claim, and shall pass upon and allow or disallow the claims or any part thereof, and notify the claimants of his determination. The court may limit the time within which creditors may present and prove to the receiver their respective claims against the corporation, and may bar all creditors and claimants failing to do so within the time limited from participating in the distribution of the assets of the corporation. The court may also prescribe what notice, by publication or otherwise, must be given to creditors of such limitation of time. (1901, c. 2, ss. 81, 82; Rev., ss 1228, 1229; C. S., s. 1212; 1955, c. 1371, s. 2.)

Duty of Court.—The court in control of a receivership should fix the time in which any and all claims against the estate of the insolvent debtor are to be presented to the receiver, give appropriate notice to creditors of such limitation of time by publication or otherwise, and postpone any order of distribution until an opportunity has been afforded for the determination of the status of all claims and their order of

priority. National Surety Corp. v. Sharpe, 232 N. C. 98, 59 S. E. (2d) 593 (1950).

Power of Receiver. — To enable the receiver to decide whether the claims are just, the law confers upon him plenary power to examine the claimants and witnesses touching the claims, and to require the production of relevant books and papers. National Surety Corp. v. Sharpe, 232 N. C. 98, 59 S. E. (2d) 593 (1950).

Creditors must file and prove their claims, when the court so directs, or be barred. Brewer v. Elks, 260 N.C. 470, 133 S.E.2d 159 (1963).

But Court May Extend Time for Filing. —The court has the discretion to permit the filing of claims subsequent to the time fixed after the appointment of the receiver. Odell Hardware Co. v. Holt-Morgan Mills, 173 N.C. 308, 92 S.E. 8 (1917).

Assignment Subject to Set-Off.—After the appointment of a receiver for a bank a creditor may assign his claim, but such assignment is subject to the receiver's right to set off claims the bank may have against the creditor, and if the assignee of a claim is himself a debtor of the bank he cannot use the assigned claim as a set-off. Davis v. Industrial Mfg. Co., 114 N.C. 321, 19 S.E. 371 (1894).

§ 1-507.7. Report on claims to court; exceptions and jury trial.—It is the duty of the receiver to report to the term of the superior court subsequent to a finding by him as to any claim against the corporation, and exceptions thereto may be filed by any person interested, within ten days after notice of the finding by the receiver, and not later than within the first three days of the said term; and, if, on an exception so filed, a jury trial is demanded, it is the duty of the court to prepare a proper issue and submit it to a jury; and if the demand is not made in the exceptions to the report the right to a jury trial is waived. The judge may, in his discretion, extend the time for filing such exceptions. Provided, that no court shall issue any order of distribution or order of discharge of a receiver until said receiver has proved to the satisfaction of the court that written notice has been mailed to the last known address of every claimant who has properly filed claim with the receiver, to the effect that such orders will be applied for at a certain time and place therein set forth and by producing a receipt issued by the United States post office, showing that such notice has been mailed to each of such claimant's last known address at least twenty days prior to the time set for hearing and passing upon such application to the court for said orders of distribution and/or discharge. (1901, c. 2, s. 83; Rev., s. 1230; C. S., s. 1213; 1945, c. 219; 1955, c. 1371, s. 2.)

The term "any person interested" undoubtedly includes a claimant who wishes to resist a finding by the receiver adjudging his claim to be invalid, or of less dignity than that alleged by him. Moreover a creditor, who has a valid claim, is certainly a "person interested" for the purpose of opposing a report of the receiver allowing the validity or priority of other asserted claims, whose payment will exhaust or reduce the receivership assets otherwise available for the satisfaction of his claim. National Surety Corp v. Sharpe, 232 N. C. 98, 59 S. E. (2d) 593 (1950).

Partner as "Interested Person."—A partner individually liable for partnership debts, if the partnership assets are insufficient to discharge a claim, is unquestionably an "interested person" who may challenge the validity of an asserted partnership obligation. Brewer v. Elks, 260 N.C. 470, 133 S.E.2d 159 (1963).

The power to extend time for filing exceptions to receiver's report is expressly given by this section. Benson v. Roberson, 226 N.C. 103, 36 S.E.2d 729 (1946).

Exceptions Not Filed within Time Prescribed.—Exceptions filed and made a part of the record are not void as a matter of law because not filed within the first three days of the term of court commencing next after the filing of the receiver's report, in the absence of motion to strike or order to that effect, and a judgment entered on the ground that such exceptions were not before the court for consideration will be remanded. Benson v. Roberson, 226 N.C. 103, 36 S.E.2d 729 (1946).

Where objections were filed by a creditor of a corporation in the hands of a receiver to an order allowing a claim against such corporation, which order adjudicated material and controverted issues of fact without consent, evidence or findings, it was held error to deny a motion to set aside the allowance of such claim and refuse to grant a hearing on such objections alleging facts which if true would constitute a valid

defense to such claim. Peoples Bank & Trust Co. v. Tar River Lumber Co., 224 N.C. 432, 31 S.E.2d 353 (1944). See also, Peoples Bank & Trust Co. v. Tar River Lumber Co., 224 N.C. 153, 29 S.E.2d 348 (1944).

Validity of claim must be determined by court. Brewer v. Elks, 260 N.C. 470, 133 S.E.2d 159 (1963).

Adjudging Claim Preferred without Notice to Other Claimants.—An order of the superior court adjudging that the claim of a particular creditor constituted a preferred claim and ordering the receiver to pay such claim, made without notice, either actual or constructive, to other claimants, is contrary to the established rules of practice and procedure in receivership proceedings. National Surety Corp. v. Sharpe, 232 N. C. 98, 59 S. E. (2d) 593 (1950).

Establishment of Claim Where Jury Trial Waived. — National Surety Corp. v. Sharpe, 236 N. C. 35, 72 S. E. (2d) 109 (1952).

Cited in Webb v. Gaskins, 255 N. C. 281, 121 S. E. (2d) 564 (1961).

§ 1-507.8. Property sold pending litigation.—When the property of an insolvent corporation is at the time of the appointment of a receiver encumbered with mortgages or other liens, the legality of which is brought in question, and the property is of a character materially to deteriorate in value pending the litigation, the court may order the receiver to sell the same, clear of encumbrance, at public or private sale, for the best price that can be obtained, and pay the money into the court, there to remain subject to the same liens and equities of all parties in interest as was the property before sale, to be disposed of as the court directs. And the receiver or receivers making such sale is hereby authorized and directed to report to the resident judge of the district or to the judge holding the courts of the district in which the property is sold, the said sale for confirmation, the said report to be made to the said judge in any county in which he may be at the time; but before acting upon said report, the said receiver or receivers shall publish in some newspaper published in the county or in some newspaper of general circulation in the county, where there is no newspaper published in the county, a notice directed to all creditors and persons interested in said property, that the said receiver will make application to the judge (naming him) at a certain place and time for the confirmation of his said report, which said notice shall be published at least ten days before the time fixed therein for the said hearing. And the said judge is authorized to act upon said report, either confirming it or rejecting the sale; and if he rejects the sale it shall be competent for him to order a new sale and the said order shall have the same force and effect as if made at a regular term of the superior court of the county in which the property is situated. (1901, c. 2, s. 86; Rev., s. 1232; C. S., s. 1214; Ex. Sess. 1924, c. 13; 1955, c. 1371, s. 2.)

Section Applicable to Pending Litigation.—The statute is a remedial one and relates only to the method of procedure in dealing with certain assets of an insolvent corporation. Such statutes, unless otherwise limited, are usually held to be applicable to pending litigation, where the language used clearly indicates that such construction was intended by the legislature, and especially where no hardship or injustice results, and the rights of the parties are thereby better secured and protected. Martin v. Vanlaningham, 189 N.C. 656, 127 S.E. 695 (1925).

§ 1-507.9. Compensation and expenses; counsel fees.—Before distribution of the assets of an insolvent corporation among the creditors or stockholders, the court shall allow a reasonable compensation to the receiver for his services, not to exceed five percent upon receipts and disbursements, and the costs and expenses of administration of his trust and of the proceedings in said court, to be first paid out of said assets. The court is authorized and empowered to allow counsel fees to an attorney serving as a receiver (in addition to the commissions allowed him as receiver as herein provided) where such attorney in behalf of the receivership renders professional services, as an attorney, which are beyond the ordinary routine of a receivership and of a type which would reasonably justify the re-

tention of legal counsel by any such receiver not himself licensed to practice law. (1901, c. 2, s. 88; Rev., s. 1226; C. S., s. 1215; 1955, c. 1371, s. 2; 1967, c. 32.)

Editor's Note. — The 1967 amendment added the second sentence.

The effect of this section is to take from the funds of the insolvent corporation a sufficient sum to pay all the costs, allowances and legitimate expenses, and then to distribute what is left according to priority. Hickson Lumber Co. v. Gay Lumber Co., 150 N.C. 281, 63 S.E. 1048 (1909).

Commissions Limited.—A rate not exceeding five per cent on receipts and five per cent on disbursements is the statutory limit of a receiver's commissions. Battery Park Bank v. Western Carolina Bank, 126 N.C. 531, 36 S.E. 39 (1900).

This section does not state that the receiver is entitled to a five per cent commission upon receipts and disbursements, but reads in part as follows, "the court shall allow a reasonable compensation to the receiver for his services, not to exceed five per cent upon receipts and disbursements." King v. Premo & King, Inc., 258 N. C. 701, 129 S. E. (2d) 493 (1963).

The allowance of commissions and counsel fees to a receiver by the superior court is prima facie correct, and the Supreme Court will not alter or modify the same unless based on the wrong principle, or clearly inadequate or excessive. King v. Premo & King, Inc., 258 N. C. 701, 129 S. E. (2d) 493 (1963).

But Allowance of Costs Is Subject to Review.—That the amount of the allowance of costs by the superior court of attorney's fees is reviewable by the Supreme Court is well settled. King v. Premo & King, Inc., 258 N. C. 701, 129 S. E. (2d) 493 (1963).

It Affects a Substantial Right of Creditors.—The allowance of the costs of administration of a receivership of an insolvent corporation made by a court affects a substantial right of the creditors, in that it disposes of a part of the assets of the insolvent corporation, and is a reduction to that extent of the amounts to which the creditors are entitled under their claims against it. King v. Premo & King, Inc., 258 N. C. 701, 129 S. E. (2d) 493 (1963).

Commission May Be Divided between Parties.—An allowance to a receiver is a part of the costs of the action and usually taxable against the losing party, but the court below may, in its discretion, divide it between the parties, as in case of referees' fees. Simmons v. Allison, 119 N.C. 556, 26 S.E. 171 (1896).

Items Includible in Costs.—Costs of administration of a receivership include, inter alia, such items as the following: 1. Court costs in proceedings relating to the receivership; 2. compensation for the receiver; 3. reasonable and proper compensation for the receiver's attorney for services which require legal knowledge and skill and which were rendered to the receiver for the benefit of the receivership; 4. costs of conserving property, in receivership; 5. costs of sales of property in receivership; 6. premiums for fire insurance on property in receivership; 7. bookkeeping, clerical, and accounting expense and postage in connection with the administration of the receivership; 8. payment of all taxes on property, real or personal, in the possession of the receiver which fall due during the time he is in possession as receiver, or which have accrued upon the property in his possession prior to his appointment. King v. Premo & King, Inc., 258 N. C. 701, 129 S. E. (2d) 493 (1963).

Commissions payable to a receiver are part of the costs and expenses of the suit in which he is appointed, and should be paid as such instead of being classed as a debt payable pro rata with other debts. Wilson Cotton Mills v. Randleman Cotton Mills, 115 N.C. 475, 20 S.E. 770 (1894).

Counsel Fees Not Allowed for Collecting Assets of Estate.—A receiver is not entitled to allowance for the services of an attorney in hunting up and taking into possession the property belonging to the estate since it is the personal duty of the receiver to look after such matters. King v. Premo & King, Inc., 258 N. C. 701, 129 S. E. (2d) 493 (1963).

Nor for Duties Not Requiring Legal Skill.—The contacting of purchasers, the showing of property for sale, the sales and resales of property, and the accounting and bookkeeping in respect to the administration of the receivership required no legal knowledge and skill, and are the performance of ordinary duties, which may and should be performed by the receiver himself, and are not the subject of an allowance of counsel fees. King v. Premo & King, Inc., 258 N. C. 701, 129 S. E. (2d) 493 (1963).

First Assets Applied to Costs.—Under this section the first assets that are the property of the corporation must be applied to the costs of the proceedings in court, including the fees of the receiver and referee, and, except as to private corporations, receivers' certificates issued in operation of the plant, under the orders of the court, and liabilities incurred for labor, and torts. Hickson Lumber Co. v. Gay Lumber Co., 150 N.C. 281, 63 S.E.

1048 (1909); Humphrey Bros. v. Buell-Crocker Lumber Co., 174 N.C. 514, 93 S.E. 971 (1917).

When Costs Prior to Mortgage.—One who takes a mortgage upon corporation property for money loaned to operate it or to secure other debts, past or prospective, does so with the knowledge that, under this section, the lien of his mortgage is subject to be displaced in favor of the expenses of receivership; but when the corporation has acquired the property subject to a valid registered mortgage, then the costs of receivership are not prior to that mortgage. Humphrey Bros. v. Buell-Crocker Lumber Co., 174 N.C. 514, 93 S.E. 971 (1917).

Allowance of Commissions Held Premature.—The allowance of commissions to receivers appointed by the court, by consent, to finish partially constructed waterworks, was premature before the work was finished, as it could not be determined whether such allowance was excessive or too little. Delafield v. Mercer Constr. Co., 118 N.C. 105, 24 S.E. 10 (1896).

Appeal.—When the order of the court below allowing commissions to a receiver for services as such is appealed from, and there is no suggestion that the amount was excessive or based upon a wrong principle, the order will not be disturbed. Talbot v. Tyson, 147 N.C. 273, 60 S.E. 1125 (1908).

The allowance of commissions and counsel fees to a receiver by the superior court is prima facie correct, and the Supreme Court will alter the same only when it is clearly inadequate or excessive. Graham v. Carr, 133 N.C. 449, 45 S.E. 847 (1903).

§ 1-507.10. Debts provided for, receiver discharged.—When a receiver has been appointed, and it afterwards appears that the debts of the corporation have been paid, or provided for, and that there remains, or can be obtained by further contributions, sufficient capital to enable it to resume its business, the court may, in its discretion, a proper case being shown, discharge the receiver, and decree that the property, rights and franchises of the corporation revert to it, and thereafter the corporation may resume control of the same, as fully as if the receiver had never been appointed. (1901, c. 2, s. 76; Rev., s. 1220; C. S., s. 1216; 1955, c. 1371, s. 2.)

Costs and expenses of receivership are generally limited to taxes and those costs and expenses necessary to preserve the estate for the benefit of all persons interested, and are payable, primarily, out of the fund in the hands of the receiver, but if necessary, out the corpus of the estate in the custody of the court. National Surety Corp v. Sharpe, 236 N. C. 35, 72 S. E. (2d) 109 (1952).

Costs of administration include such items as the following: (1) Court costs in proceedings relating to the receivership; (2) compensation for the receiver; (3) compensation for the receiver's attorney; (4) bookkeeping and clerical expense; (5) auditing expense; (6) premiums for fire insurance on property in receivership; (7) compensation for watchmen for services in guarding property in receivership, and (8) costs of sale of property in receivership. National Surety Corp v Sharpe, 236 N C. 35, 72 S E (2d) 109 (1952)

Cost of Administration and Expenses of Operation Distinguished. — See National Surety Corp v Sharpe, 236 N. C. 35, 72 S E (2d) 109 (1952)

Costs of administration are preferred in payment to expenses of operation National Surety Corp v Sharpe, 236 N. C. 35, 72 S. E. (2d) 109 (1952).

Expenses of Operation Subordinate to Claims of Non-Consenting Lienholders.—Indebtedness incurred by a receiver for the expenses of carrying on and operating the business of an insolvent private concern owing no duty to the public cannot be given priority over the claims of non-consenting lienholders to the corpus of the property. National Surety Corp v. Sharpe, 236 N. C. 35, 72 S. E. (2d) 109 (1952).

The court may charge against the interest of lienholders expenses incurred by the receiver in preserving and selling the property subject to the liens and in applying the cash realized by its sale upon the claims of the lienholders. As a general rule, however, expenses of this character will not be charged against the interests of lienholders where unencumbered assets are available for their payment. National Surety Corp. v. Sharpe, 236 N. C. 35, 72 S. E. (2d) 109 (1952)

Discharged Receiver Not Proper Party.—Where the receiver of an insolvent railroad company has been discharged, he is not a proper party to an action against a foreclosure purchaser to recover for personal injuries suffered after the receiver's discharge. Howe v. Harper, 127 N.C. 356, 37 S.E. 505 (1900).

§ 1-507.11. Reorganization.—When a majority in interest of the stockholders of the corporation have agreed upon a plan for its reorganization and a resumption by it of the management and control of its property and business, the corporation may, with the consent of the court, upon the reconveyance to it of its property and franchises, either by deed or decree of the court, mortgage the same for an amount necessary for the purposes of the reorganization; and may issue bonds or other evidences of indebtedness, or aditional stock, or both, and use the same for the full or partial payment of the creditors who will accept the same, or otherwise dispose of the same for the purposes of the reorganization. (1901, c. 2, s. 77; Rev., s. 1221; C. S., s. 1217; 1955, c. 1371, s. 2.)

Power of Superior Court.—This section gives the superior court, in a receivership, power to approve a plan for the reorganization of a corporation, which provides for the readjustment of the company's capital structure, when approved by a majority in interest of the stockholders; but it cannot affect either the rights of dissenting stockholders not parties to the receivership, or the vested rights of parties to the proceedings unless they fail to appear. Commercial Nat'l Bank v. Mooresville Cotton Mills, 222 N.C. 305, 22 S.E.2d 913 (1942).

Consent of Creditors Unnecessary.—Where a corporation engaged in business transfers its entire property rights and franchise to a new company incorporated and organized by the same stockholders and directors as the old, and the new company continues the business and adopts the contracts of its predecessor, the effect of such a merger is to create a novation so far as the creditors of the old company are concerned and to substitute the new one as debtor, and in such case it is not necessary to obtain the consent of the creditors of the old company to the change. Friedenwald Co. v. Asheville Tobacco Works & Cigarette Co., 117 N.C. 544, 23 S.E. 490 (1895).

New Corporation Assumes Contracts of Old.—Where, by merger of an old into a new corporation, a novation of the debts of the old is created, the new corporation is, to all intents and purposes, the same body and answerable for its own contracts made under a different name. Friedenwald Co. v. Asheville Tobacco Works & Cigarette Co., 117 N.C. 544, 23 S.E. 490 (1895).

Duty of Fiduciaries.—In the reorganization of a corporation under this section, executors, trustees, and other fiduciaries, holding stock in the corporation, not only have the right, but it is their duty, to assert whatever legal rights they may have which in their opinion will be for the best interest of the estates involved. Commercial Nat'l Bank v. Mooresville Cotton Mills, 222 N.C. 305, 22 S.E.2d 913 (1942).

Article 39.

Deposit or Delivery of Money or Other Property.

§ 1-508. Ordered paid into court.

When Court Will Order Money Delivered to Party. – Where a tenant, upon the uncontroverted facts, is entitled, as a matter of law, to the proceeds of a crop insurance policy paid into court by insurer, free from the landlord's crop lien for advancements, the court has authority under this section to order that such fund be delivered to the tenant. Peoples v. United States Fire Ins. Co., 248 N. C. 303, 103 S. E. (2d) 381 (1958).

§ 1-510. Defendant ordered to satisfy admitted sum.

This section may not be invoked where its application would give sanction to piecemeal recoveries which would be essentially inconsistent Universal C I T. Credit Corp. v. Saunders, 235 N. C. 369, 70 S. E. (2d) 176 (1952).

Cited in Wachovia Bank & Trust Co. v. Wilder, 255 N. C. 114, 120 S. E. (2d) 404 (1961).

SUBCHAPTER XIV. ACTIONS IN PARTICULAR CASES.

ARTICLE 40.

Mandamus.

§ 1-513. For other relief returnable in vacation; issues of fact.

Necessity for Motion for Jury Trial.— In accord with original. See Wilson Realty Co. v. City & County Planning Board, 243 N. C. 648, 92 S. E. (2d) 82 (1956); Better Home Furniture Co. v. Baron, 243 N. C. 502, 91 S. E. (2d) 236 (1956).

Cited in Hamlet Hospital v. Joint Committee, 234 N. C 673, 68 S E. (2d) 862 (1952); Smith v. City of Rockingham, 268 N.C. 697, 151 S.E.2d 568 (1966).

ARTICLE 41.

Quo Warranto.

§ 1-514. Writs of sci. fa. and quo warranto abolished.

This article prescribes a specific mode for trying the title to a public office. Such relief is to be sought in a civil action State v. Ponder, 234 N. C. 294, 67 S. E. (2d) 292 (1951).

The title to a public office can only be determined in a direct proceeding brought for that purpose under the statutes incorporated in this article. Corey v. Hardison, 236 N. C. 147, 72 S. E. (2d) 416 (1952).

§ 1-515. Action by Attorney General.

A private person cannot institute or maintain an action of this character in his own name or upon his own authority even though he be a claimant of the office. The action must be brought and prosecuted in the name of the State by the Attorney General, or in the name of the State upon the relation of a private person, who claims to be entitled to the office, or in the name of the State upon the relation of a private person, who is a citizen and taxpayer of the jurisdiction where the officer is to exercise his duties and powers. State v. Ponder, 234 N. C. 294, 67 S. E. (2d) 292 (1951).

Applied in State ex rel. Pitts v. Williams, 260, N.C. 168, 132 S.E.2d 329 (1963).

Cited in Edwards v Board of Education, 235 N. C. 345, 70 S. E. (2d) 170 (1952); State v. Mustain, 243 N. C. 564, 91 S. E. (2d) 696 (1956); Starbuck v. Havelock, 252 N. C. 176, 113 S. E. (2d) 278 (1960).

§ 1-516. Action by private person with leave.

Prerequisites to Prosecution of Action by Private Person.—Before any private person can commence or maintain an action of this nature in the capacity of a relator, he must apply to the Attorney General for permission to bring the action, tender to the Attorney General satisfactory security to indemnify the State against all costs and expenses incident to the action, and obtain leave from the Attorney General to bring the action in the name of the State upon his relation. State v Ponder, 234 N. C. 294, 67 S. E. (2d) 292 (1951)

Judge Cannot Confer Power to Prosecute Action. — Where a relator had no leave from the Attorney General permitting him to sue as such, he was incapacitated by law to prosecute the action and the trial judge could not confer upon him the legal power denied to him by positive legislative enactment through the simple expedient of designating him a party-plaintiff and treating his answer as a complaint State v. Ponder, 234 N. C. 294, 67 S. E. (2d) 292 (1951).

§ 1-520. Several claims tried in one action.

Stated in State v. Ponder, 234 N. C. 294, 67 S. E. (2d) 292 (1951).

§ 1-522. Time for bringing action.

Applied in State v. Smitherman, 251 N. C. 682, 111 S. E. (2d) 834 (1960).

§ 1-530. Relator inducted into office; duty.

Cited in Edwards v. Board of Education, 235 N. C. 345, 70 S. E. (2d) 170 (1952).

Article 42.

Waste.

§ 1-533. Remedy and judgment.

Cross Reference.—See note to § 1-538.

Section 41-11 Has No Application to Action for Waste.—See note to § 41-11.

§ 1-538. Judgment for treble damages and possession.

Judgment Must Be in Accord with This Section. — In an action by remaindermen against the life tenant for waste under § 1-533, judgment must be in accord with this section, and the court in such action has no authority to order the realty to be sold and the life tenant's share, diminished in the amount of damages awarded by the jury for waste, paid to the life tenant. Parrish v. Parrish, 247 N. C. 584, 101 S. E. (2d) 480 (1958).

Article 43.

Nuisance and Other Wrongs.

§ 1-538.1. Damages for malicious or wilful destruction of property by minors.

—Any person, firm, corporation, the State of North Carolina or any political subdivision thereof, or any religious, educational or charitable organization, or any nonprofit cemetery corporation, or organization, whether incorporated or unincorporated, shall be entitled to recover damages in an amount not to exceed five hundred dollars ($500.00), in an action in a court of competent jurisdiction, from the parents of any minor under the age of eighteen (18) years, living with its parents, who shall maliciously or wilfully destroy property, real, personal or mixed, belonging to any such person, firm, corporation, the State of North Carolina or any political subdivision thereof, or any religious, educational or charitable organization. (1961, c. 1101.)

Editor's Note.—For comment on this section, see 40 N. C. Law Rev. 619.

Purpose of Section.—This section and similar statutes appear to have been adopted not out of consideration for providing a restorative compensation for the victims of injurious or tortious conduct of children, but as an aid in the control of juvenile delinquency. General Ins. Co. of America v. Faulkner, 259 N. C. 317, 130 S. E. (2d) 645 (1963).

The rationale of this section apparently is that parental indifference and failure to supervise the activities of children is one of the major causes of juvenile delinquency; that parental liability for harm done by children will stimulate attention and supervision; and that the total effect will be a reduction in the anti-social behavior of children. General Ins. Co., of America v. Faulkner, 259 N. C. 317, 130 S. E. (2d) 645 (1963).

The limitation in this section of liability to malicious or wilful acts of children, as well as the limitation of liability to an amount not to exceed $500.00 for the destruction of property fails to serve any of the general compensatory objectives of tort law. General Ins. Co. of America v. Faulkner, 259 N. C. 317, 130 S. E. (2d) 645 (1963).

It Is Constitutional.—The enactment of this section is within the police power of the State and it is not violative of the provisions of Const., Art. I, § 17, or of the provisions of the Fifth Amendment to the federal Constitution. General Ins. Co. of America v. Faulkner, 259 N. C. 317, 130 S. E. (2d) 645 (1963).

And Does Not Violate Parents' Rights.—This section gives to the parents of children a full opportunity to be heard or defend before a competent tribunal in an orderly proceeding adapted to the nature of the case, which is uniform and regular and in accord with fundamental rules which do not violate fundamental rights. General Ins. Co. of America v. Faulkner, 259 N. C. 317, 130 S. E. (2d) 645 (1963).

It Imposes Vicarious Liability on Parents.— In an action against the parents under this section the complaint is not fatally defective because it fails to allege that any act or omission to act on the part of the defendants was the proximate cause of an injury to plaintiff, for the reason that this section imposes vicarious liability upon parents by virtue of their relationship for the malicious or wilful destruction of property by a child under the age of eighteen living with them. General Ins. Co. of America v Faulkner, 259 N. C. 317, 130 S. E. (2d) 645 (1963).

Unlike Common Law.—At common law, the mere relationship of parent and child was not considered a proper basis for imposing vicarious liability upon the parent for the torts of the child. General Ins. Co. of America v. Faulkner, 259 N. C. 317, 130 S. E. (2d) 645 (1963).

Parental liability for a child's tort at common law was imposed generally in two situations, i.e., where there was an agency relationship, or where the parent was himself guilty in the commission of the tort in some way. General Ins. Co. of America v. Faulkner, 259 N. C. 317, 130 S. E. (2d) 645 (1963).

Necessary Elements to Be Shown.—For the plaintiff to recover from the parents he must establish, inter alia, by the greater weight of the evidence, (1) that the minor was under the age of eighteen years living with his parents, and (2) that the child maliciously or wilfully destroyed property, real, personal, or mixed. General Ins. Co. of America v. Faulkner, 259 N. C. 317, 130 S. E. (2d) 645 (1963).

Insurer Paying Loss May Sue on Subrogated Claim.—An insurance company, as plaintiff, may bring suit in its own name against defendants upon a claim to which it has become subrogated by payment in full of its loss to its insured under the provisions of its policy of insurance, who, pursuant to the provisions of this section, would have been able to bring such an action in its own name. General Ins. Co. of America v Faulkner, 259 N. C. 317, 130 S. E. (2d) 645 (1963).

Application of Section to Automobile Collision Case.—See Smith v. Simpson, 260 N.C. 601, 133 S.E.2d 474 (1963).

§ 1-539.1. Damages for unlawful cutting or removal of timber; misrepresentation of property lines.—(a) Any person, firm or corporation not being the bona fide owner thereof or agent of the owner who shall without the consent and permission of the bona fide owner enter upon the land of another and injure, cut or remove any valuable wood, timber, shrub or tree therefrom, shall be liable to the owner of said land for double the value of such wood, timber, shrubs or trees so injured, cut or removed.

(b) Any person, firm or corporation cutting timber under contract and incurring damages as provided in subsection (a) of this section as a result of a misrepresentation of property lines by the party letting the contract shall be entitled to reimbursement from the party letting the contract for damages incurred. (1945, c. 837; 1955, c. 594.)

Editor's Note. - The 1955 amendment rewrote this section.

For brief comment on the 1955 amendment, see 33 N. C. Law Rev. 533.

Cited in Paschal v Autry, 256 N. C. 166, 123 S. E. (2d) 569 (1962).

§ 1-539.2. Dismantling portion of building.—When one person owns a portion of a building and another or other persons own the remainder of said building, neither of said owners shall dismantle his portion of said building without making secure the portions of said building belonging to other persons. Any person violating the provisions of this section shall be responsible in damages to the owners of other portions of such building. (1955, c. 1359.)

ARTICLE 43A.

Adjudication of Small Claims in Superior Court.

§ 1-539.3. Small claims defined; to what actions article applies.—The procedure for adjudicating small claims in the superior courts of this State shall be as herein set forth. A small claim is defined as:

(a) An action in which the relief demanded is a money judgment and the

sum prayed for (exclusive of interests and costs of court) by the plaintiff, defendant, or other party does not exceed one thousand dollars ($1,000.00), which may include the ancillary remedy of attachment if the property to be attached does not exceed a value of one thousand dollars ($1,000.00); or,

(b) An action in which the relief demanded is the foreclosure of a lien on real or personal property where the sum prayed for does not exceed one thousand dollars ($1,000.00); or,

(c) An action in which the relief demanded is the recovery of personal property of a value not exceeding one thousand dollars ($1,000.00), which may include the ancillary remedy of claim and delivery if the property claimed does not exceed a value of one thousand dollars ($1,000.00); and in which no jury trial is demanded.

This article shall not apply to actions within the jurisdiction of courts of justice of the peace. (1955, c. 1337, s 1.)

Applied in Jackson v. McCoury, 247 N C. 502, 101 S. E. (2d) 377 (1958); Hajoca Corp. v. Brooks, 249 N. C. 10, 105 S E. (2d) 10 (1958); Phillips v. Alston 257 N. C. 255, 125 S. E. (2d) 580 (1962); R. B. Stokes Concrete Co. v. Warden, 268 N.C. 466, 150 S.E.2d 849 (1966).

Cited in Better Home Furniture Co. v. Baron, 243 N. C. 502, 91 S E (2d) 236 (1956); Schloss v Hallman, 255 N. C. 686, 122 S. E. (2d) 513 (1961).

§ 1-539.4. Small claims docket; caption of complaint; when value of property to be stated; deposit for costs.—Each clerk of the superior court shall maintain a small claims docket. The clerk shall docket in the small claims docket any action in which the relief demanded is a small claim, as defined above. In all such actions the plaintiff shall set forth in the caption of the complaint the words "small claim". If any party demands the foreclosure of a lien on real or personal property, the recovery of personal property, or the ancillary remedy of attachment, such party shall, in his pleading or by affidavit, state that the value of the property does not exceed one thousand dollars ($1,000.00) No prosecution bond shall be demanded of plaintiff when instituting a small claims action, but the clerk shall require such advance deposit for costs as the board of county commissioners shall determine, but not in excess of the advance deposit for costs as in other actions. (1955, c. 1337, s. 2.)

Action Instituted Prior to Passage of Article.—See note to § 1-539.7.

§ 1-539.5. Jury trial.—No trial jury shall be had in small claims actions, unless a party thereto shall demand a jury trial in the first pleading filed by him provided that in the trial of small claims actions where there is no jury trial, the judge shall not be required to comply with the provisions of G. S. 1-185 unless one of the parties so requests, and such request may be made before or after the verdict; and provided further that when any of the parties to the action are entitled to a judgment by default and inquiry against an adverse party thereto under G. S. 1-212 or G. S. 1-213, no jury trial shall be required. (1955, c. 1337 s. 3; 1959, c. 912; 1963, c. 468, s. 3.)

Editor's Note. — The 1959 amendment added the first proviso.

The 1963 amendment added the second proviso.

Application of §§ 1-185 to 1-187.—When this article is made applicable to a particular county by appropriate resolution of its board of county commissioners, the right to jury trial in such county may be waived as provided herein. To this extent, this article supplements § 1-184. Construing these statutes in pari materia, it is clear that the provisions of §§ 1-185, 1-186 and 1-187, relating to proceedings upon waiver of jury trial under § 1-184, apply equally when a jury trial is waived under this article. Hajoca Corp. v. Brooks, 249 N. C. 10, 105 S. E. (2d) 10 (1958), decided before the passage of the 1959 amendment to this section.

Waiver.—Defendant's failure to demand a jury trial, as provided by this section,

constituted a waiver of that right. Great Am. Ins. Co. v. Holiday Motors of High Point, Inc., 264 N.C. 444, 142 S.E.2d 13 (1965).

Applied in Jackson v. McCoury, 247 N. C. 502, 101 S. E. (2d) 377 (1958); Tripp v. Harris, 260 N.C. 200, 132 S.E.2d 322 (1963).

Cited in Anderson v. Cashion, 265 N.C. 555, 144 S.E.2d 583 (1965); Sherrill v. Boyce, 265 N.C. 560, 144 S.E.2d 596 (1965).

§ 1-539.6. Transfer of action to regular civil issue docket.—If the defendant in a small claims action files an answer in which a jury trial is demanded or in which affirmative relief is demanded which is not a small claim, as defined above, the action shall be transferred to the regular civil issue docket. (1955, c. 1337, s. 4.)

§ 1-539.7. Civil appeals to superior court placed on small claims docket.—All civil appeals to the superior court from trial courts inferior to the superior court, including civil appeals from courts of justices of the peace, which come within the above definition of a small claim, shall be placed upon the small claims docket, unless at the time the appeal is docketed in the superior court, or within ten days thereafter, a party to the action shall file with the clerk a written demand for a jury trial. (1955, c. 1337, s. 5; 1961, c. 1184.)

Editor's Note. — The 1961 amendment added after the word "court" in line two the words "including civil appeals from courts of justices of the peace."

Section 6 of the act from which this article was derived provides: Any civil action instituted in the superior court, or any civil appeal to the superior court from a trial court inferior to the superior court, which comes within the above definition of a small claim and which was docketed in the superior court prior to July 1, 1955, may be transferred to the small claims docket upon the written request of all parties to the action.

§ 1-539.8. Article applicable only in counties which adopt it.—This article shall apply only to those counties in which the board of county commissioners shall by resolution adopt the provisions hereof. (1955, c. 1337, s. 7.)

ARTICLE 43B.

Defense of Charitable Immunity Abolished.

§ 1-539.9. Defense abolished as to actions arising after September 1, 1967.—The common-law defense of charitable immunity is abolished and shall not constitute a valid defense to any action or cause of action arising subsequent to September 1, 1967. (1967, c. 856.)

SUBCHAPTER XV. INCIDENTAL PROCEDURE IN CIVIL ACTIONS.

ARTICLE 44.

Compromise.

§ 1-540. By agreement receipt of less sum is discharge.

I. GENERAL CONSIDERATION.

What Constitutes Accord and Satisfaction.—See Allgood v. Wilmington Sav & Trust Co., 242 N. C. 506, 88 S. E. (2d) 825 (1955).

Payment to beneficiary of one half of proceeds of life insurance policy did not constitute accord and satisfaction as a matter of law where beneficiary testified that by virtue of such payment she did not abandon her right to balance of proceeds, and receipt did not expressly state that the sum received was in full settlement. Allgood v. Wilmington Sav & Trust Co., 242 N. C. 506, 88 S. E. (2d) 825 (1955).

II. EFFECT OF COMPROMISE OR RECEIPT OF PART IN FULL PAYMENT.

Acts as Complete Discharge.—Ordinarily when a creditor calls on his

debtor or a beneficiary calls on his trustee for an accounting and settlement and the demand is met with an offer of money or property in full discharge of debtor's or trustee's obligation, an acceptance and retention of the thing tendered constitutes a complete discharge, even though the sum or property received is less than the amount actually owing. Prentzas v. Prentzas, 260 N. C. 101, 131 S. E. (2d) 678 (1963).

Checks Accepted as Settlement, etc.— In accord with 1st paragraph in original. See Allgood v. Wilmington Sav & Trust Co., 242 N. C. 506, 88 S. E. (2d) 825 (1955); Fidelity & Casualty Co. of New York v. Nello L. Teer Co., 250 N. C. 547, 109 S. E. (2d) 171 (1959).

When in case of a disputed account between parties a check is given and received under such circumstances as clearly import that it is intended to be, and is tendered, in full settlement of the disputed items, the acceptance and cashing of the check and the appropriation of the proceeds will be regarded as complete satisfaction of the claim. One party will not be allowed to accept the benefit of the check so tendered and at the same time retain the right to sue for an additional amount. Moore v. Greene, 237 N. C. 614, 75 S. E. (2d) 649 (1953).

Retention of Deed and Collection of Rentals.— Where a partnership in real estate held for rentals had title to land purchased with partnership funds and, after demand by one of the two partners for an accounting, one of the pieces of real estate was conveyed to him with the verbal statement that it was in complete settlement, the retention of the deed and the collection of rentals would constitute a settlement regardless of the intent of the grantee partner if he accepted the deed as conveying the property to him in his individual capacity and collected the rentals on the basis of individual ownership, but would not constitute a settlement if he merely retained title for the partnership, offering to account for the rents and profits in the settlement of the partnership affairs. Prentzas v. Prentzas, 260 N. C. 101, 131 S. E. (2d) 678 (1963).

III. APPLICATION OF SECTION.

Section Held Controlling. — Where a settlement was arrived at between the parties by the terms of which all claims between them were settled by the payment to plaintiff of $10,000 and for which he executed releases in full on all claims against the defendants or either of them, and payment was made by check of defendant on which was plainly typed: "Settlement of all accounts in full as of today November 8, 1954," and the check was endorsed and cashed by plaintiff, this section is clearly applicable and controlling. Jordan Motor Lines v. McIntyre, 157 F. Supp. 475 (1957).

§ 1-540.1. Effect of release of original wrongdoer on liability of physicians and surgeons for malpractice.—The compromise settlement or release of a cause of action against a person responsible for a personal injury to another shall not operate as a bar to an action by the injured party against a physician or surgeon or other professional practitioner treating such injury for the negligent treatment thereof, unless the express terms of the compromise, settlement or release agreement given by the injured party to the person responsible for the initial injury provide otherwise. (1961, c. 212.)

Editor's Note.—The act adding this section is effective as of Oct. 1, 1961.

For comment on effect of release given tort-feasor causing initial injury in later action for malpractice against treating physician, see 40 N. C. Law Rev. 88.

For case law survey on tort law, see 43 N.C.L. Rev. 906 (1965).

Section does not violate N. C. Const., Art. I, § 1. Galloway v. Lawrence, 263 N.C. 433, 139 S.E.2d 761 (1965).

§ 1-540.2. Settlement of property damage claims arising from motor vehicle collisions or accidents; same not to constitute admission of liability, nor bar party seeking damages for bodily injury or death.— In any claim, civil action, or potential civil action which arises out of a motor vehicle collision or accident, settlement of any property damage claim arising from such collision or accident, whether such settlement be made by an individual, a self-insurer, or by an insurance carrier under a policy of insurance, shall not constitute an admission of liability on the part of the person, self-insurer or insurance carrier making such settlement, which arises out of the same motor vehicle colli-

sion or accident. It shall be incompetent for any claimant or party plaintiff in the said civil action to offer into evidence, either by oral testimony or paper writing, the fact that a settlement of the property damage claim arising from such collision or accident has been made; provided further, that settlement made of such property damage claim arising out of a motor vehicle collision or accident shall not in and of itself act as a bar, release, accord and satisfaction, or discharge of any claims other than the property damage claim, unless by the written terms of a properly executed settlement agreement it is specifically stated that the acceptance of said settlement constitutes full settlement of all claims and causes of action arising out of the said motor vehicle collision or accident. (1967, c. 662, s. 1.)

Editor's Note.—Session Laws 1967, c. 662, s. 3, provides that the act shall become effective July 1, 1967, and shall apply to claims and causes of action arising after said date.

§ 1-541. Tender of judgment.

Tender of judgment which is not made until after nonsuit has been entered and plaintiff has appealed therefrom and the session of court has expired, does not comply with this section. Oldham & Worth, Inc. v. Bratton, 263 N.C. 307, 139 S.E.2d 653 (1965).

§ 1-543. Disclaimer of title in trespass; tender of judgment.

Cited in Smith v. Pate, 246 N. C. 63, 97 S. E. (2d) 457 (1957).

ARTICLE 44A.

Tender.

§ 1-543.1. Service of order of tender; return.—In all matters in which it is proper or necessary to make or serve a tender, the clerk of the superior court in the county in which the tender is to be made shall, upon request of the tendering party, direct the sheriff of said county to serve an order of tender, together with the property to be tendered, upon the party or parties upon whom said tender is to be made. In the event said property is incapable of being manually tendered, said order of tender shall so state and service of said order tendering same shall have the same legal effect as if the property had been manually tendered. Within five days after receipt of the order, the sheriff shall make his return thereon, showing upon whom the same was served, the date and hour of service, the property tendered, and whether or not said tender was accepted, or that, after due diligence, the party or parties upon whom service was to be made could not be found within the county. He shall then return said order of tender to the clerk who issued it, and this shall constitute proper tender. Nothing in this section shall be construed to prevent other methods of tender or tender by any party to an action in open court upon any other party to said action. (1965, c. 699.)

ARTICLE 45.

Arbitration and Award.

§ 1-544. Agreement for arbitration.

Provisions of Article are Cumulative and Concurrent.—

The statutory methods of arbitration provide cumulative and concurrent rather than exclusive procedural remedies. Lammonds v. Aleo Mfg. Co., 243 N. C. 749, 92 S. E. (2d) 143 (1956).

Applicability to Agreement Respecting Future Controversies. —

This article applies only to agreements to arbitrate controversies existing between the parties at the time of the execution of the agreement to adopt this method of settlement. Skinner v. Gaither Corp., 234 N. C. 385, 67 S. E. (2d) 267 (1951).

When a cause of action has arisen, the courts cannot be ousted of their jurisdiction by an agreement, previously entered into, to submit the rights and liabilities of the parties to arbitration or to some other

tribunal named in the agreement. Skinner v Gaither Corp 234 N C 385, 67 S E (2d) 267 (1951); McDonough Constr. Co. v. Hanner, 232 F. Supp. 887 (M.D.N.C. 1964).

Contracts to submit future disputes to arbitration, and thus oust the jurisdiction of the courts, are invalid, and the courts will not specifically, or by indirection, compel performance of such contracts by refusing to entertain a suit until after arbitration. McDonough Constr. Co. v. Hanner, 232 F. Supp. 887 (M.D.N.C. 1964).

Arbitration as Matter of Contract. — The agreement of the parties to arbitrate is a contract The relation of the parties is contractual Their rights and liabilities are controlled by the law of contract A breach of the contract may give rise to a cause of action for damages, but the contract itself is not a defense against a suit on the cause of action the parties agreed to arbitrate In an action on the contract the courts will not decree specific performance of the agreement Neither will they, by indirection, compel specific performance by refusing to entertain the suit until after arbitration is had under the agreement. Skinner v. Gaither Corp., 234 N. C. 385, 67 S. E. (2d) 267 (1951).

The fact that disputed provisions of a collective labor contract have been arbitrated under the procedure outlined in the contract does not make the question of an accounting for an employee's wages one of arbitration and award under the Uniform Arbitration Act. Nor does the statutory procedure for the voluntary arbitration of labor disputes as contained in G. S. 95-36.1 et seq., preclude maintenance of an action by the employee for such accounting. Lammonds v. Aleo Mfg. Co., 243 N. C. 749, 92 S. E. (2d) 143 (1956)

At any time before an arbitration award is rendered under the contract, either party may elect to breach his contract and seek his remedy in the tribunal provided by law. McDonough Constr. Co. v. Hanner, 232 F. Supp. 887 (M.D.N.C. 1964).

It would be contradictory and unwise to hold that a contract to arbitrate future disputes is void and unenforceable as being against public policy, and at the same time hold that a breach of the same contract would give rise to an action for damages. McDonough Constr. Co. v. Hanner, 232 F. Supp. 887 (M.D.N.C. 1964).

§ 1-551. Award within sixty days.

"Making" and "Delivery" of Award Distinguished.—The Uniform Arbitration Act treats the "making" of the award and the "delivery" of the award to the parties as two separate and distinct provisions. Poe & Sons, Inc. v. University of North Carolina, 248 N. C. 617, 104 S. E. (2d) 189 (1958).

§ 1-553. Requirement of attendance of witnesses.

Cross Reference.—See §§ 6-52 and 6-55.

§ 1-557. Award in writing and signed by arbitrators.

"Making" and "Delivery" of Award Distinguished.—See note to § 1-551.

§ 1-559. Order vacating award.

An arbitrator must act within the scope of the authority conferred on him by the arbitration agreement, and his award is subject to attack on the ground that he exceeded his authority under a mistake of law and upon other grounds. Calvine Cotton Mills, Inc. v. Textile Workers Union, 238 N. C. 719, 79 S. E. (2d) 181 (1953).

§ 1-560. Order modifying or correcting award.

Cited in Calvine Cotton Mills, Inc. v. Textile Workers Union, 238 N. C. 719, 79 S. E. (2d) 181 (1953).

Article 46.

Examination before Trial.

§ 1-568.1. Definitions.

Editor's Note.—

For brief comment on this article, see 29 N C. Law Rev 373

As to effect of former statute, see Culbertson v Rogers, 242 N C 622, 89 S E. (2d) 299 (1955), overruling so much of

McGraw v. Southern R. Co., 209 N C 432, 184 S E 31 (1936), as is in conflict.

Applied in Safeguard Ins. Co. v. Wilmington Cold Storage Co., 267 N.C. 679, 149 S.E.2d 27 (1966).

Cited in McCurdy v. Ashley, 259 N. C. 619, 131 S.E. (2d) 321 (1963); B-W Acceptance Corp. v. Spencer, 268 N.C. 1, 149 S.E.2d 570 (1966).

§ 1-568.3. Purposes for which examination may be had.

Applied in Furr v. Simpson, 271 N.C. 221, 155 S.E.2d 746 (1967).

Quoted in Aldridge v Hasty, 240 N C 353, 82 S E. (2d) 331 (1954); Griners' & Shaw Inc. v. Continental Cas. Co., 255 N. C. 380, 121 S. E. (2d) 572 (1961); Potts v. Howser, 267 N.C. 484, 148 S.E.2d 836 (1966).

Stated in Tillis v. Calvine Cotton Mills, Inc., 238 N. C. 124, 76 S E. (2d) 376 (1953).

§ 1-568.4. Who may examine and be examined.

(e) An examination may be had of any officer, agent, or employee of a corporation which is a party to the action and any officer, agent, or employee of a party or parties to the action, or any landowner, adjoining landowner, or predecessor in title in any suit or special proceeding relative to real property. (1957, c. 1384.)

Cross Reference. — As to effect of adverse examination of defendant on waiver of testimony concerning transactions with deceased, see § 8-51.

Editor's Note. — The 1957 amendment added that part of subsection (e) appearing after the word "action" in line two As only this subsection was changed by the amendment the rest of the section is not set out.

Denial of Application for Bill of Particulars Does Not Preclude Examination of Adverse Party. — A bill of particulars under § 1-150 and a bill of discovery under this article are not inconsistent remedies, and therefore the denial of an application for a bill of particulars does not preclude the same party from thereafter moving for leave to examine the adverse party in regard to the same matters. Tillis v Calvine Cotton Mills, Inc., 238 N. C 124, 76 S E. (2d) 376 (1953)

The commissioner has no judicial authority to make a determination that a person summoned is an agent of an adverse party and therefore subject to examination. Berry Bros. Corp. v. Adams-Millis Corp., 257 N. C. 263, 125 S. E. (2d) 577 (1962).

§ 1-568.5. Where examination may be held.

Stated in Aldridge v Hasty, 240 N. C. 353, 82 S. E. (2d) 331 (1954).

§ 1-568.6. Examination held by commissioner.

Quoted in Berry Bros Corp. v. Adam-Millis Corp., 257 N. C. 263, 125 S. E. (2d) 577 (1962).

§ 1-568.7. Powers of commissioner.

—In addition to his other powers the commissioner may—

(1) Grant continuances from time to time for good cause;
(2) Administer oaths to witnesses; and
(3) Designate a reporter to take and transcribe the examination;
(4) The commissioner shall order the examining party, or his counsel, to furnish the examined party a copy of the deposition or transcript of the examination, without cost. (1951, c. 760, s. 1; 1965, c. 184.)

Editor's Note.—The 1965 amendment added subdivision (4).

Quoted in Berry Bros. Corp. v. Adams-Millis Corp., 257 N. C. 263, 125 S. E. (2d) 577 (1962).

§ 1-568.8. Procedure exclusive; judge's or clerk's authority to fix details.

Examination of Officers of Defendant Corporation. — The procedure prescribed in this article is the only procedure by which a plaintiff can compel the officers of

a defendant corporation to submit to his adverse examination of them prior to the trial of the action. Kohler v. J. A. Jones Constr. Co., 271 N.C. 187, 155 S.E.2d 558 (1967).

Quoted in Berry Bros. Corp. v. Adams-Millis Corp., 257 N. C. 263, 125 S. E. (2d) 577 (1962).

§ 1-568.9. When examination is and when not matter of right.

Examination of Officers of Corporate Defendant.—The plaintiff may procure an order for examination of the officers of his corporate adversary, prior to the filing of his complaint, only by showing "that the examination is necessary to enable him properly to prepare his complaint." Kohler v. J. A. Jones Constr. Co., 271 N.C. 187, 155 S.E.2d 558 (1967).

Applied in Brown v. Randolph Hosp., Inc., 269 N.C. 253, 152 S.E.2d 327 (1967).

Quoted in Griners' & Shaw, Inc. v. Continental Cas Co., 255 N. C. 380, 121 S. E. (2d) 572 (1961).

Stated in Tillis v. Calvine Cotton Mills, Inc., 238 N. C. 124, 76 S. E. (2d) 376 (1953); Potts v. Howser, 267 N.C. 484, 148 S.E.2d 836 (1966).

§ 1-568.10. Preliminary procedure for examination before examining party's initial pleading has been filed.

Plaintiff is entitled to an order of examination only in respect to those matters which relate to the action it has instituted. Griners' & Shaw, Inc. v. Continental Cas. Co., 255 N. C. 380, 121 S. E. (2d) 572 (1961).

Where the application for the adverse examination of defendants in an action to recover for negligence in the treatment of a hospital patient was too sweeping in not confining the request to the examination of defendants in regard to their diagnosis, treatment, and procedures in the care of the particular patient and the hospital records relating thereto, the order for the examination was properly vacated, but plaintiff was properly given an opportunity to file an amended petition for an examination of the defendants within proper limits. Brown v. Randolph Hosp., Inc., 269 N.C. 253, 152 S.E.2d 327 (1967).

Examination Is Not to Be Lightly Allowed.—This section does not contemplate that compulsory examination of his adversary by one who has not filed a complaint is to be lightly allowed. Kohler v. J. A. Jones Constr. Co., 271 N.C. 187, 155 S.E.2d 558 (1967).

A ransacking expedition seeking a new cause of action is not within the intent and purpose of this article permitting an examination before trial for the purpose of obtaining information necessary to prepare a complaint in the action instituted. Griners' & Shaw, Inc. v. Continental Cas. Co., 255 N. C. 380, 121 S. E. (2d) 572 (1961).

This section does not contemplate the issuance of a general permit for the plaintiff to embark upon an unrestricted "fishing expedition" through the records and recollections of his adversary. Kohler v. J. A. Jones Constr. Co., 271 N.C. 187, 155 S.E.2d 558 (1967).

Showing of Necessity. — This section plainly requires that the affidavit must not only describe, with reasonable particularity, the "fish" to be pursued, but must also show that its capture is necessary for the proper preparation of the complaint and that it may not otherwise be brought into the possession of the plaintiff. Kohler v. J. A. Jones Constr. Co., 271 N.C. 187, 155 S.E.2d 558 (1967).

It is not sufficient for the affidavit to assert that the desired information is necessary to enable the applicant to prepare his pleading properly, it being required that the affidavit state facts upon which such claim of necessity is based. Kohler v. J. A. Jones Constr. Co., 271 N.C. 187, 155 S.E.2d 558 (1967).

Appeal Presents for Review Legal Sufficiency of Application. An appeal from an order for the examination of the adverse party presents for review the legal sufficiency of the application for examination. Griners' & Shaw, Inc. v. Continental Cas. Co., 255 N. C. 380, 121 S. E. (2d) 572 (1961).

The application for examination is a necessary part of the record proper on an appeal from an order allowing the application. Griners' & Shaw, Inc. v. Continental Cas. Co., 255 N. C. 380, 121 S. E. (2d) 572 (1961).

Supreme Court May Modify Order so as to Restrict Examination. — Where the order grants a more extensive "fishing license" than this section permits, the Supreme Court will modify the order so as to restrict it to the examination contemplated by the statute. Kohler v. J. A. Jones Constr. Co., 271 N.C. 187, 155 S.E.2d 558 (1967).

Application Held Insufficient.—Factual averments in plaintiff's application for an

order of examination held fatally insufficient. Griners' & Shaw Inc. v. Continental Cas. Co., 255 N. C. 380, 121 S. E. (2d) 572 (1961).

Applied in Jones v. Fowler, 242 N C. 162, 87 S. E. (2d) 1 (1955); Glenn v. Smith, 264 N.C. 706, 142 S.E.2d 596 (1965).

§ 1-568.11. Preliminary procedure for examination after initial pleadings have been filed.

(b) The application must be in the form of, or supported by, an affidavit showing:

(1) That the action has been commenced;

(2) That the applicant has filed complaint, petition or answer;

(3) That the applicant desires to examine a designated person who has filed a petition, complaint or answer or on whose behalf a petition, complaint or answer has been filed;

(4) That the examination should be held at a place designated in the affidavit, together with facts showing the reasons for the designation of such place.

(1955, c. 1345, s. 1.)

Editor's Note. — The 1955 amendment substituted at the end of paragraph (4) of subsection (b) the words "for the designation of such place" for the word "therefor." As the rest of the section was not changed, only subsection (b) is set out.

Examination Is Matter of Right.—After the examining party and the party to be examined have both filed their pleadings, an examination is a matter of right and may be had as provided by this section. Aldridge v. Hasty, 240 N C 353, 82 S. E. (2d) 331 (1954); Furr v. Simpson, 271 N.C. 221, 155 S.E.2d 746 (1967).

Applicant Not Required to State Reasons Why He Desires Examination.—This section does not require the applicant to state the reasons why he desires the examination or the information he seeks to obtain. The "reasons" to be alleged are the reasons for naming the place for the hearing designated in the petition. Aldridge v. Hasty, 240 N. C. 353, 82 S. E. (2d) 331 (1954).

Reasons for Requesting That Examination Be Had at Courthouse of County of Defendants' Residence.—Where it is alleged in the petition that the parties to be examined are residents of a specific county, and the courthouse there is the place provided for judicial hearings, these are sufficient reasons for requesting that the examination be had at the courthouse of the county of defendants' residence. Aldridge v. Hasty, 240 N C. 353, 82 S. E. (2d) 331 (1954).

Commissioner Is without Judicial Authority.— The commissioner for the examination of designated persons pursuant to this section, is not vested with judicial authority and may not determine in his discretion whether the witnesses to be examined should be sequestered, or whether a certain person summoned is an agent of the adverse party and therefore subject to examination, and the commissioner's rulings thereon are void. Berry Bros. Corp. v. Adams Millis Corp., 257 N. C. 263, 125 S.E. (2d) 577 (1962).

And Should Refer Judicial Questions to Clerk.—Where a commissioner appointed pursuant to this section enters an order allowing the sequestration of witnesses and enters an order holding that one of the witnesses was an agent and subject to examination, such orders are void but an appeal will not lie therefrom to the judge of the superior court, the proper procedure being for the commissioner to refer the judicial questions at least in the first instance to the clerk who issued the order for the examination. Berry Bros Corp. v. Adams-Millis Corp., 257 N. C. 263, 125 S. E (2d) 577 (1962).

Appeal.—An interlocutory order of a superior court judge affirming an order of the clerk entered in accordance with this section, does not deprive appellant of a substantial right and no appeal lies therefrom. Black v. Williamson, 256 N. C. 763, 127 S. E. (2d) 519 (1962).

Orders requiring, or refusing to require, a party to answer questions in a pretrial examination are not immediately appealable. Furr v. Simpson, 271 N.C. 221, 155 S.E.2d 746 (1967).

Applied in Tillis v. Calvine Cotton Mills, Inc., 238 N. C. 124, 76 S. E. (2d) 376 (1953).

§ 1-568.14. Notice to other parties.

Applied in Aldridge v. Hasty, 240 N C. 353, 82 S. E. (2d) 331 (1954); Glenn v. Smith, 264 N.C. 706, 142 S.E.2d 596 (1965); Furr v. Simpson, 271 N.C. 221, 155 S.E.2d 746 (1967).

§ 1-568.16. The examination.

The prescribed duties of the commissioner are administrative, not judicial, in character. Berry Bros Corp. v. Adams-Millis Corp., 257 N. C. 263, 125 S. E. (2d) 577 (1962).

This article does not confer upon the commissioner the judicial authority, in his discretion, to order the sequestration of witnesses or to determine whether a certain person summoned is an agent of an adverse party and subject to determination. Berry Bros. Corp. v. Adams-Millis Corp., 257 N. C. 263, 125 S. E. (2d) 577 (1962).

§ 1-568.17. Written interrogatories.

Cited in Tillis v. Calvine Cotton Mills, Inc., 238 N. C. 124, 76 S. E. (2d) 376 (1953); Potts v. Howser, 267 N.C. 484, 148 S.E.2d 836 (1966).

§ 1-568.18. Refusal to answer question; procedure to compel answer.

Plaintiff should not be denied a plain statutory right to examine defendants before trial solely because they claim that any answers they make may subject them to a penalty. Allred v. Graves, 261 N.C. 31, 134 S.E.2d 186 (1964).

And proceeding with an examination will not deny defendants any constitutional right, because any defendant who cannot answer the questions, or any of them, propounded to him on the examination without giving testimony that would necessarily tend to subject him to punitive damages, to an execution against his person, and to a deprivation of his homestead exemption and of any personal property exemption over and above fifty dollars, can then claim his privilege against self-incrimination and refuse to answer; if plaintiff pursues the matter further pursuant to the provisions of this section and § 1-568.19, his claim of privilege can be properly ruled on according to the provisions of these sections. Allred v. Graves, 261 N.C. 31, 134 S.E.2d 186 (1964).

Applied in Furr v. Simpson, 271 N.C. 221, 155 S.E.2d 746 (1967).

Quoted in Berry Bros Corp. v. Adams-Millis Corp., 257 N. C. 263, 125 S. E. (2d) 577 (1962).

Cited in Tillis v. Calvine Cotton Mills, Inc., 238 N. C. 124, 76 S. E. (2d) 376 (1953); Galyon v. Stutts, 241 N. C. 120, 84 S. E. (2d) 822 (1954); Black v. Williamson, 257 N. C. 763, 127 S. E. (2d) 519 (1962).

§ 1-568.19. Failure to appear for examination or to answer question as ordered.

Cross Reference.—See note to § 1-568.18.

This section merely provides procedure for the enforcement of the preceding section, § 1-568.18, which prescribes the procedure to be followed in compelling answers on adverse examination. Galyon v. Stutts, 241 N. C. 120, 84 S. E. (2d) 822 (1954).

Quoted in Berry Bros Corp. v. Adams-Millis Corp., 257 N. C. 263, 125 S. E. (2d) 577 (1962).

Cited in Black v. Williamson, 257 N. C. 763, 127 S. E. (2d) 519 (1962).

§ 1-568.23. Waiver of errors and irregularities.

Cited in Tillis v. Calvine Cotton Mills, Inc., 238 N. C. 124, 76 S. E. (2d) 376 (1953).

§ 1-568.24. Use of deposition at trial.

Party May Introduce Own Examination.—Where plaintiff examines defendant adversely prior to trial, the defendant is entitled to introduce the record of his own examination at the trial. Watson v. Stallings, 270 N.C. 187, 154 S.E.2d 308 (1967).

Admissibility of Examination Taken in Prior Action.—Where there was nothing in the record to indicate that the plaintiff was a party to the suit in which the examination was procured at the time the order for the examination was issued, the plaintiff had no opportunity to cross-examine at the time of the examination, and it was error to admit such examination in evidence. Glenn v. Smith, 264 N.C. 706, 142 S.E.2d 596 (1965).

Applied in Aldridge v. Hasty, 240 N. C. 353, 82 S. E. (2d) 331 (1954).

§ 1-568.25. Effect of taking deposition and of introducing deposition; rebuttal.—(a) A party by examining a person pursuant to the provisions of this article does not make such person his witness.

(b) When a party introduces in evidence any part of the deposition taken by him of an adverse party or of an officer or agent of a corporate adversary, and such adverse party or officer or agent testifies at the trial in his own behalf or in behalf of the corporate adversary, the party who introduced the deposition or part thereof may thereupon cross-examine such witness and may contradict him and impeach his credibility in the same manner as any other witness. (1951, c. 760, s. 1, 1953, c. 885, s. 2; 1957, c. 695.)

Editor's Note.—

The 1953 amendment deleted from subsection (a) the words "but the party who introduces the deposition in evidence, or who first introduces any part thereof in evidence, does make such person his witness." It also rewrote subsection (b). For brief comment on the 1953 amendment, see 31 N. C. Law Rev. 411.

The 1957 amendment rewrote the latter part of subsection (b). Prior to the amendment it ended with the words "but may not impeach his credibility except by the showing of prior inconsistent statements upon proper foundation laid."

Examined Party Becomes Witness of Adversary Introducing Examination. — When the adverse examination of a defendant was introduced in evidence by the plaintiff, the plaintiff made him his witness and represented that he was worthy of belief. Cline v. Atwood, 267 N.C. 182, 147 S.E.2d 885 (1966).

A party does not make his adversary his witness by taking his adverse examination, unless he offers the adverse examination, or part of it, in evidence at the trial. Cline v. Atwood, 267 N.C. 182, 147 S.E.2d 885 (1966).

But He May Be Contradicted.—When a plaintiff makes a party in the litigation his own witness, he is not allowed to impeach him by attacking his credibility, but retains the right to contradict him by the testimony of other witnesses whose testimony may be inconsistent with his. Cline v. Atwood, 267 N.C. 182, 147 S.E.2d 885 (1966).

Examining Party May Cross-Examine Adversary Whose Deposition He Has Used.—Under the amendment of 1953, the examining party may cross-examine his adversary whose deposition he has used, if and when such adversary becomes a witness in his own behalf at the trial, and may contradict him but "may not impeach his credibility except by the showing of prior inconsistent statements upon proper foundation laid." Aldridge v. Hasty, 240 N. C. 353, 82 S. E. (2d) 331 (1954).

ARTICLE 47.

Motions and Orders.

§ 1-578. Motions; when and where made and heard.—An application for an order is a motion. Motions may be made to the clerk of a superior court, or to a judge out of court, except for new trial on the merits. Motions must be made within the district in which the action is triable, and may be heard in any county of a district by the resident judge or any judge holding courts in the district; provided, no motion may be heard and no orders in the cause may be made outside the county where the action is pending unless notice of motion be served on the opposing party in accordance with the provisions of G. S. 1-581. A motion to vacate or modify a provisional remedy, and an appeal from an order allowing a provisional remedy, have preference over all other motions. (C. C. P., ss. 344, 345; Code, s. 594; Rev., s. 874; C. S., s. 909; 1961, c. 456.)

Editor's Note.—

The 1961 amendment added all of the third sentence following the first comma.

A motion is not a pleading within the meaning of § 1-144. Williams v. Denning, 260 N.C. 539, 133 S.E.2d 150 (1963).

§ 1-581. Notice of motion.

Test of Necessity for Notice.—The true test as to necessity of notice of motion in a case not specially provided for, is as follows: If upon the particular facts presented the applicant is entitled to the precise order applied for as a matter of strict right, and the adversary party is powerless to oppose, the order may be granted ex parte, even though it might be better practice to require notice to be given. But if the adverse party appears for any reason to be entitled to be heard in opposition to the whole or any part of the relief sought, the application must be made on notice to such adverse party. Collins v. North Carolina State Highway, etc., Comm., 237 N. C. 277, 74 S. E. (2d) 709 (1953).

Notice May Be Waived.—A party who is entitled to notice of a motion may waive notice. A party ordinarily does this by attending the hearing of the motion and participating in it. Collins v. North Carolina State Highway, etc., Comm., 237 N. C. 277, 74 S. E. (2d) 709 (1953); In re Woodell, 253 N. C. 420, 117 S. E. (2d) 4 (1960).

Form, Contents and Mode of Service of Notice. — When notice of a motion is necessary, it must be in writing; it must disclose the nature of the motion, and the time and place set for its hearing; it must be served on the adversary party or his attorney ten days before the time appointed for the hearing, unless the court prescribes a shorter time by an order made without notice; and it must be served by an officer unless some other mode of service is particularly prescribed, or service is accepted by the adverse party or his attorney. Collins v. North Carolina State Highway, etc., Comm., 237 N. C. 277, 74 S. E. (2d) 709 (1953).

Applied in East Carolina Lumber Co. v. West, 247 N. C. 699, 102 S. E. (2d) 248 (1958); Perry v. Jolly, 259 N. C. 306, 130 S. E. (2d) 654 (1963).

Cited in Hamlet Hospital v. Joint Committee, 234 N. C. 673, 68 S. E. (2d) 862 (1952); In re Application for Reassignment, 247 N. C. 413, 101 S. E. (2d) 359 (1958).

§ 1-582. Orders without notice, vacated.

Judge Should Find Facts as to Grounds of Motion and Meritorious Defense.—When a judge of superior court hears a motion to set aside a judgment for mistake, surprise or excusable neglect, under § 1-220, it is his duty upon request so to do, to find the facts not only in respect to the grounds on which the motion is made, but as to meritorious defense. Failure to do so is error. The same rule would apply to hearing on motion to vacate an order under this section for reason that it was made without notice. Sprinkle v. Sprinkle, 241 N. C. 713, 86 S. E. (2d) 422 (1955).

Court May Refuse to Entertain Motion to Vacate Not Made within Reasonable Time.—An order made without notice when notice should have been given is irregular. It may be set aside under this section. But a court may refuse to entertain a motion to vacate an order entered without notice if it is not made within a reasonable time after entry of the order. Collins v. North Carolina State Highway, etc., Comm., 237 N. C. 277, 74 S. E. (2d) 709 (1953).

ARTICLE 48.

Notices.

§ 1-585. Form and service.

Applied in Harris v. Harris, 257 N. C. 416, 126 S. E. (2d) 83 (1962).

Cited in In re Hardin, 248 N. C. 66, 102 S. E. (2d) 420 (1958).

§ 1-586. Service upon attorney.

Cited in In re Hardin, 248 N. C. 66, 102 S. E. (2d) 420 (1958).

§ 1-587. Service upon a party.

Cited in Brown v. Allen, 344 U. S. 443, 73 S. Ct. 397, 437 (1953).

§ 1-588. Service by publication.

Cited in Collins v. North Carolina State Highway, etc., Comm., 237 N. C. 277, 74 S. E. (2d) 709 (1953).

§ 1-589. Service by telephone, telegram, or certified or registered mail on witnesses and jurors.—Sheriffs, constables and other officers charged with service of such process may serve subpoenas for witnesses and summons for jurors by telephone, telegram, or certified or registered mail, and such service shall be valid and binding on the person served. When such process is served by telephone, the return of the officer serving it shall state it was served by telephone. When served by certified or registered mail, a copy shall be mailed and a written receipt requested of the addressee and such receipt shall be filed with the return and be a necessary part thereof. When such process is served by telegram, the return of the officer serving it shall state it was so served and shall attach to the subpoena or summons a copy of such telegram, setting forth the subpoena or summons in full, and a service message from the telegraph company showing personal delivery of such telegram to the addressee; a return so made shall be prima facie evidence of such service and the person therein named shall be bound to appear in the same manner as if personally served. (1915, c. 48; C. S., s. 918; 1925, c. 98; 1945, c. 635; 1959, c. 522, s. 1.)

Local Modification. — Cumberland: 1957, c. 1324, s. 1

Editor's Note.—

The 1959 amendment rewrote this section, adding the references to telegrams and certified mail.

Cited in Vaughan v. Broadfoot, 267 N.C. 691, 149 S.E.2d 37 (1966).

§ 1-589.1. Withholding information necessary for service on law-enforcement officer prohibited. — When service of subpoena, or any other court process, is sought upon any law-enforcement officer of the State or of any political subdivision thereof pursuant to the provisions of G.S. 1-589, or of any other statute, it shall be unlawful for any officer or employee of the agency by whom the officer sought to be served is employed willfully to withhold the address or telephone number of the officer sought to be served with subpoena or other process. (1967, c. 456.)

§ 1-592. Officer's return evidence of service.

Officer's Return Is Prima Facie Correct.—

When the return shows legal service by an authorized officer, nothing else appearing, the law presumes service. The service is deemed established unless, upon motion in the cause, the legal presumption is rebutted by evidence upon which a finding of nonservice is properly based. Upon hearing such motion, the burden of proof is upon the party who seeks to set aside the officer's return or the judgment based thereon to establish nonservice as a fact; and, notwithstanding positive evidence of nonservice, the officer's return is evidence upon which the court may base a finding that service was made as shown by the return. Harrington v. Rice, 245 N. C. 640, 97 S. E. (2d) 239 (1957); North State Fin. Co. v. Leonard, 263 N.C. 167, 139 S.E.2d 356 (1964).

The return on the summons and the recitals in the judgment that process had been served on defendant by delivering a copy to its general manager sufficed prima facie to show valid service. Tyndall v. Triangle Mobile Homes, Inc., 264 N.C. 467, 142 S.E.2d 21 (1965).

Clear and Unequivocal Evidence Required to Set Aside Officer's Return.—An officer's return or a judgment based thereon may not be set aside unless the evidence consists of more than a single contradictory affidavit (the contradictory testimony of one witness) and is clear and unequivocal. Harrington v. Rice, 245 N. C. 640, 97 S. E. (2d) 239 (1957).

Defendant has burden of repelling prima facie case made by the sheriff's return. Tyndall v. Triangle Mobile Homes, Inc., 264 N.C. 467, 142 S.E.2d 21 (1965).

Credibility of witnesses and weight of evidence are for determination by the court in discharging its duty to find the facts. North State Fin. Co. v. Leonard, 263 N.C. 167, 139 S.E.2d 356 (1964).

Evidence of Attorney's Withdrawal.—Written notice served on a client would

be the most satisfactory evidence of timely notice of an attorney's withdrawal from a case. Smith v. Bryant, 264 N.C. 208, 141 S.E.2d 303 (1965).

Evidence Held Sufficient. — Evidence was sufficient to sustain the court's finding that notwithstanding the officer's return showing service, the defendant had not been personally served, and judgment setting aside default judgment entered against her in the cause was affirmed. Harrington v. Rice, 245 N. C. 640, 97 S. E. (2d) 239 (1957).

Article 49.

Time.

§ 1-593. How computed.—The time within which an act is to be done, as provided by law, shall be computed by excluding the first and including the last day. If the last day is Saturday, Sunday or a legal holiday, it must be excluded. (C. C. P., s. 348; Code, s. 596; Rev., s. 887; C. S., s. 922; 1957, c. 141.)

Editor's Note. — The 1957 amendment inserted the word "Saturday."

This section applies to the computation of time, whether the time to be taken into account is days, months, or years. Hardbarger v. Deal, 258 N. C. 31, 127 S. E. (2d) 771 (1962).

"Exclude" Defined. — In construing this section the Supreme Court has decided in many cases that "exclude" means to shut out, to refuse consideration in the computation of time. Bowles v. Bowles, 237 N. C. 462, 75 S. E. (2d) 413 (1953).

Period of Limitation Extended If Last Day Is Sunday or Holiday.—If the last day of a period of limitation for commencing an action falls on a Sunday or on a legal holiday, the period is extended and the action may be commenced on the following secular or business day. Hardbarger v Deal, 258 N. C. 31 127 S. E. (2d) 771 (1962)

Where County Clerk's Office Closed on Easter Monday.—When this section and §§ 2-24, 103-4, and 103-5 are construed together, the closing of a county clerk's office on Easter Monday pursuant to resolution by the board of county commissioners in which Easter Monday was designated a holiday, a plaintiff, if otherwise entitled to commence an action on Easter Monday is entitled to commence the action on the next day the courthouse is open for business. Hardbarger v. Deal, 258 N. C. 31, 127 S. E. (2d) 771 (1962).

Judicial Notice.—The court would take judicial notice of the fact that 2 September 1962, the last day of the two-year period beginning with the death of the plaintiff's intestate, was Sunday, and that the following day was the first Monday in September, a public holiday. The action was instituted on 4 September 1962 by the issuance of summons and, therefore, was instituted within the time allowed by § 1-53. Kinlaw v. Norfolk So. Ry., 269 N.C. 110, 152 S.E.2d 329 (1967).

Applied in Walker v. Southern Ry., 237 F. Supp. 278 (W.D.N.C. 1965).

Article 50.

General Provisions as to Legal Advertising.

§ 1-597. Regulations for newspaper publication of legal notices, advertisements, etc.

Notwithstanding the provisions of G. S. 1-599, whenever a notice or any other paper, document or legal advertisement of any kind or description shall be authorized or required by any of the laws of the State of North Carolina, heretofore or hereafter enacted, or by any order or judgment of any court of this State to be published or advertised in a newspaper qualified for legal advertising in a county and there is no newspaper qualified for legal advertising as defined in this section in such county, then it shall be deemed sufficient compliance with such laws, order or judgment by publication of such notice or any other such paper, document or legal advertisement of any kind or description in a newspaper published in an adjoining county or in a county within the same judicial district; provided, if the clerk of the superior court finds as a fact that such newspaper otherwise meets the requirements of this section and has a general

circulation in such county where no newspaper is published meeting the requirements of this section. (1939, c. 170, s. 1; 1941, c. 96; 1959, c. 350.)

Editor's Note. — The 1959 amendment added the second paragraph to this section. As the first paragraph was not affected by the amendment it is not set out.

Notice Ineffective Unless Published as Provided in This Section.—Under this section, the publication of a notice of sale under a power contained in a deed of trust is wholly ineffective unless it is published in a newspaper having a general circulation, within the county where the land to be sold is located, to subscribers who have actually paid the subscription price therefor. Jones v. Percy, 237 N. C. 239, 74 S. E. (2d) 700 (1953).

Cited in Harrison v. Hanvey, 265 N.C. 243, 143 S.E.2d 593 (1965).

§ 1-600. Proof of publication of notice in newspaper; prima facie evidence.—(a) Publication of any notice permitted or required by law to be published in a newspaper may be proved by a printed copy of the notice together with an affidavit made before some person authorized to administer oaths, of the publisher, proprietor, editor, managing editor, business or circulation manager, advertising, classified advertising or any other advertising manager, or foreman of the newspaper, showing that the notice has been printed therein and the date or dates of publication. If the newspaper is published by a corporation, the affidavit may be made by one of the persons hereinbefore designated or by the president, vice president, secretary, assistant secretary, treasurer, or assistant treasurer of the corporation.

(b) Such affidavit and copy of the notice shall constitute prima facie evidence of the facts stated therein concerning publication of such notice.

(c) The method of proof of publication of a notice provided for in this section is not exclusive, and the facts concerning such publication may be proved by any competent evidence. (1951, c. 1005, s. 2; 1957, c. 204.)

Editor's Note. — The 1957 amendment inserted "managing editor" in line four of subsection (a).

Chapter 1B.

Contribution.

Article 1.

Uniform Contribution among Tort-Feasors Act.

Article 2.

Judgment against Joint Obligors or Joint Tort-Feasors.

Article 3.

Cross Claims and Joinder of Third Parties for Contribution.

ARTICLE 1.

Uniform Contribution among Tort-Feasors Act.

§ 1B-1. Right to contribution.—(a) Except as otherwise provided in this article, where two or more persons become jointly or severally liable in tort for the same injury to person or property or for the same wrongful death, there is a right of contribution among them even though judgment has not been recovered against all or any of them.

(b) The right of contribution exists only in favor of a tort-feasor who has paid more than his pro rata share of the common liability, and his total recovery is limited to the amount paid by him in excess of his pro rata share. No tort-feasor is compelled to make contribution beyond his own pro rata share of the entire liability.

(c) There is no right of contribution in favor of any tort-feasor who has intentionally caused or contributed to the injury or wrongful death.

(d) A tort-feasor who enters into a settlement with a claimant is not entitled to recover contribution from another tort-feasor whose liability for the injury or wrongful death has not been extinguished nor in respect to any amount paid in a settlement which is in excess of what was reasonable.

(e) A liability insurer, who by payment has discharged in full or in part the liability of a tort-feasor and has thereby discharged in full its obligation as insurer, succeeds to the tort-feasor's right of contribution to the extent of the amount it has paid in excess of the tort-feasor's pro rata share of the common liability. This provision does not limit or impair any right of subrogation arising from any other relationship.

(f) This article does not impair any right of indemnity under existing law. Where one tort-feasor is entitled to indemnity from another, the right of the indemnity obligee is for indemnity and not contribution, and the indemnity obligor is not entitled to contribution from the obligee for any portion of his indemnity obligation.

(g) This article shall not apply to breaches of trust or of other fiduciary obligation. (1967, c. 847, s. 1.)

Editor's Note.—Section 4, c. 847, Session Laws 1967, provides that the act shall be in full force and effect from and after Jan. 1, 1968. Section 3½, c. 847, Session Laws 1967, provides that the act shall not apply to litigation pending on its effective date.

§ 1B-2. Pro rata shares.—In determining the pro rata shares of tort-feasors in the entire liability

(1) Their relative degree of fault shall not be considered;

(2) If equity requires, the collective liability of some as a group shall constitute a single share; and

(3) Principles of equity applicable to contribution generally shall apply. (1967, c. 847, s. 1.)

§ 1B-3. Enforcement.—(a) Whether or not judgment has been entered in an action against two or more tort-feasors for the same injury or wrongful death, contribution may be enforced by separate action.

(b) Where a judgment has been entered in an action against two or more tort-feasors for the same injury or wrongful death, contribution may be enforced in that action by judgment in favor of one against other judgment defendants by motion upon notice to all parties to the action.

(c) If there is a judgment for the injury or wrongful death against the tort-feasor seeking contribution, any separate action by him to enforce contribution must be commenced within one year after the judgment has become final by lapse of time for appeal or after final judgment is entered in the trial court in conformity with the decisions of the appellate court.

(d) If there is no judgment for the injury or wrongful death against the tort-feasor seeking contribution, his right of contribution is barred unless he has either

(1) Discharged by payment the common liability within the statute of limitations period applicable to claimant's right of action against him and has commenced his action for contribution within one year after payment,

(2) Agreed while action is pending against him to discharge the common liability and has within one year after the agreement paid the liability and commenced his action for contribution, or

(3) While action is pending against him, joined the other tort-feasors as third-party defendants for the purpose of contribution.

(e) The recovery of judgment against one tort-feasor for the injury or wrongful death does not of itself discharge the other tort-feasors from liability to the claimant. The satisfaction of the judgment discharges the other tort-feasors from liability to the claimant for the same injury or wrongful death, but does not impair any right of contribution.

(f) The judgment of the court in determining the liability of the several defendants to the claimant for the same injury or wrongful death shall be binding as among such defendants in determining their right to contribution. (1967, c. 847, s. 1.)

§ **1B-4. Release or covenant not to sue.**—When a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death:

(1) It does not discharge any of the other tort-feasors from liability for the injury or wrongful death unless its terms so provide; but it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater; and,

(2) It discharges the tort-feasor to whom it is given from all liability for contribution to any other tort-feasor. (1967, c. 847, s. 1.)

§ **1B-5. Uniformity of interpretation.**—This article shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states that enact it. (1967, c. 847, s. 1.)

§ **1B-6. Short title.**—This article may be cited as the Uniform Contribution among Tort-Feasors Act. (1967, c. 847, s. 1.)

ARTICLE 2.

Judgment against Joint Obligors or Joint Tort-Feasors.

§ **1B-7. Payment of judgment by one of several.**—(a) In all cases in the courts of this State wherein judgment has been, or may hereafter be, rendered against two or more persons or corporations, who are jointly and severally liable for its payment either as joint obligors or joint tort-feasors, and the same has not been paid by all the judgment debtors by each paying his pro rata share thereof, if one or more of the judgment debtors shall pay the judgment creditor, either before or after execution has been issued, the full amount due on said judgment, and shall have entered on the judgment docket in the manner hereinafter set out a notation of the preservation of the right of contribution, such notation shall have the effect of preserving the lien of the judgment and of keeping the same in full force as against any judgment debtor who does not pay his pro rata share thereof to the extent of his liability thereunder in law and equity. Such judgment may be enforced by execution or otherwise in behalf of the judgment debtor or debtors who have so preserved the judgment.

(b) The entry on the judgment docket shall be made in the same manner as other cancellations of judgment, and shall recite that the same has been satisfied, released and discharged, together with all costs and interest, as to the paying judgment debtor, naming him, but that the lien of the judgment is preserved as to the other judgment debtors for the purpose of contribution. No entry of cancellation as

to such other judgment debtors shall be made upon the judgment docket or judgment index by virtue of such payment.

(c) If the judgment debtors disagree as to their pro rata shares of the liability, on the grounds that any judgment debtor is insolvent or is a nonresident of the State and cannot be forced under the execution of the court to contribute to the payment of the judgment, or upon other grounds in law and equity, their shares may be determined upon motion in the cause and notice to all parties to the action. Issues of fact arising therein shall be tried by jury as in other civil actions. (1967, c. 847, s. 1.)

Article 3.

Cross Claims and Joinder of Third Parties for Contribution.

§ 1B-8. Cross claims and joinder of third parties.—(a) A joint tort-feasor who is a party to an action may file a cross claim for contribution or indemnity from any other joint tort-feasor who is a party.

(b) At any time before judgment is obtained a defendant tort-feasor, as a third-party plaintiff, may upon motion cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. If the motion is granted and the summons and complaint are served, the person so served, hereinafter called the third-party defendant, shall make his defenses to the third-party plaintiff's claim and his counterclaims against the third-party plaintiff and cross claims against other third-party defendants. A third-party defendant may proceed under this subsection against any person not a party to the action who is or may be liable to him as a joint tort-feasor for all or a part of the claim made in the action against the third-party defendant. (1967, c. 847, s. 1.)

STATE OF NORTH CAROLINA

Department of Justice

Raleigh, North Carolina

November 1, 1967

I, Thomas Wade Bruton, Attorney General of North Carolina, do hereby certify that the foregoing 1967 Cumulative Supplement to the General Statutes of North Carolina was prepared and published by The Michie Company under the supervision of the Division of Legislative Drafting and Codification of Statutes of the Department of Justice of the State of North Carolina.

Thomas Wade Bruton
Attorney General of North Carolina